

The Lessons of Abu Ghraib

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After September 11, 2001, active debate occurred over what seemed like a theoretical question: should the United States ever resort to torture to obtain information from captured al Qaeda or other terrorist suspects? The tragic events in Abu Ghraib in 2003 served one useful purpose: they allowed the debate on torture to transcend the theoretical and enter the world of reality. In this Article, I argue that Abu Ghraib provides real world proof for the argument that torture should never be sanctioned. This Article explores five lessons to be derived from Abu Ghraib. First, what happened there demonstrates that moral ambiguity toward torture inevitably leads to the commission of torture; anything short of an absolute, unequivocal condemnation of abusive interrogation tactics invites the use of torture. Second, attempting to limit the use of torture to extreme situations, like the "ticking bomb" scenario, does not work. Third, torture is an ineffective way to obtain valuable information. Fourth, any benefit derived from torturing a suspect is more than outweighed by the harms such a practice engenders. And finally, the future debate over torture must be about the definition of torture.

Shortly after September 11, 2001, journalists, scholars, and others actively debated what seemed like a theoretical question: should the United States ever resort to torture to obtain information from captured al Qaeda and other terrorist suspects?¹ I joined the discussion, opining that torture should

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¹ Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 201 n.3 (2003). According to Alan Dershowitz, "the events of September 11 require us to imagine the unimaginable, and think the unthinkable." *Id.* Professor Dershowitz further commented that "the events of September 11 . . . should make all of us rethink even our most fundamental beliefs about the law The events of September 11 have focused the minds of many on issues they never previously considered . . . [including leading] some people to advocate such extreme measures as truth serum and even torture." Alan Dershowitz, *Terror and the Law, Part Two: Rethink Everything*, JD JUNGLE, Feb./Mar. 2002, at 48, 52.

Others shared similar beliefs. See Jonathan Alter, *Time To Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45 ("In this autumn of anger, even a liberal can find his thoughts turning to . . . torture."); Alexander Cockburn, *The Wide World of Torture*, NATION, Nov. 26, 2001, at 10 (calling torture "the week's hot topic"); see also Vicki Haddock, *The Unspeakable: To Get At The Truth, Is Torture or Coercion Ever Justified?*, S.F. CHRON., Nov. 18, 2001, at D1 (noting law professor Robert Weisberg's remarks that "[t]he fact that we're even having this conversation [about torture] shows how much things have changed since Sept. 11.").

never be engaged in because it was wrong, ineffective, and counterproductive.² Moreover, I argued that there should not be a “ticking bomb” exception to this absolute prohibition, in part because torture would not likely be confined to this narrow, remote circumstance.³

Unfortunately, by 2004, this debate had stopped being theoretical. It had become abundantly clear that some United States military and civilian officials were engaged in “aggressive” interrogation tactics that could well constitute torture.⁴ Finally, in May 2004, the rumblings about American behavior had a face, and this time the pictures were truly worth a thousand words. Aired on *60 Minutes II*, the graphic display of photographs of abuse

Interestingly, Winfried Brugger, a German law professor, is one person who was contemplating the question of torture and terrorists prior to September 11. Professor Brugger wrote an article in anticipation of the possibility of terrorists with weapons of mass destruction. He posed the question of whether torture is ever justified. In concluding affirmatively, Brugger acknowledged that, to his knowledge, he was the first German law professor in the last fifty years to advocate the use of torture even in exceptional circumstances. Winfried Brugger, *May Government Ever Use Torture? Two Responses From German Law*, 48 AM. J. COMP. L. 661, 677 (2000).

² Strauss, *supra* note 1, at 207–8, 253–74.

³ *Id.* at 258–60, 265–74. In the “ticking bomb” scenario, law enforcement personnel would be permitted to torture a suspected terrorist if there were considerable evidence that significant numbers of innocent people were in imminent danger and the only way to obtain the necessary information to save them would be through the use of extreme measures. *Id.* at 205, 265.

⁴ For example, the International Committee of the Red Cross alleged serious claims of abuse as early as October 2003. In February 2004, Red Cross officials sent a report directly to the staffs of Lieutenant General Ricardo Sanchez, the top U.S. commander in Baghdad, and L. Paul Bremer, head of the U.S. Coalition Provisional Authority. Johanna McGeary, *The Scandal's Growing Stain: Abuses by U.S. Soldiers in Iraq Shock the World and Roil the Bush Administration. The Inside Story of What Went Wrong—And Who's to Blame*, TIME, May 17, 2004, at 26, 32. See also *infra* notes 6, 26, and accompanying text.

As Mark Danner wrote:

Shortly after the 9/11 attacks, Americans began torturing prisoners, and they have never really stopped. However much these words have about them the ring of accusation, they must by now be accepted as fact. From Red Cross reports, Maj. Gen. Antonio M. Taguba's inquiry, James R. Schlesinger's Pentagon-sanctioned commission and other government and independent investigations, we have in our possession hundreds of accounts of ‘cruel, inhuman and degrading’ treatment . . . ‘tantamount to torture.’

Mark Danner, *We Are All Torturers Now*, N.Y. TIMES, Jan. 6, 2005, at A27; accord, Andrew Sullivan, *Atrocities in Plain Sight*, N.Y. TIMES, Jan. 13, 2005, at G1 (book review) (detailing the growing evidence that authorities were aware of abuses and did little to prevent or stop them).

in Abu Ghraib prison shocked the world. As one observer noted, “[i]t was Saddam’s torture chamber, and now it’s ours.”⁵

The tragic events in Abu Ghraib serve two useful functions. They allow the debate on torture to be revisited once again, and provide real world proof for the argument that torture should never be sanctioned. Thus, this Article addresses the lessons of Abu Ghraib: what can we learn from the events there (and elsewhere)?

There are five lessons that I would like to discuss. First, and most importantly, what happened at Abu Ghraib demonstrates that moral ambiguity toward torture leads to torture—anything short of an absolute, unequivocal condemnation of abusive interrogation methods inevitably invites the use of torture. The second lesson of Abu Ghraib is that attempting to limit the use of torture to extreme situations, like the “ticking bomb,” scenario does not work. Third, the Abu Ghraib situation reinforces the notion that torture is an ineffective tool for obtaining valuable information in the war on terror. The fourth lesson from Abu Ghraib is that any benefit derived from torture is more than outweighed by the harms such a practice engenders. And finally, the fifth lesson is that the future debate over torture must be about definition.

Before considering the lessons in more detail, however, the story of Abu Ghraib must be set forth. What precisely transpired in what was once Saddam’s torture chamber and then America’s?

I. THE STORY OF ABU GHRAIB

Though the atrocities in Abu Ghraib in the fall of 2003 have received the bulk of media attention, the story of abuse does not begin there. For years, various human rights organizations complained about the interrogation tactics in Afghanistan and at Guantanamo Bay (Gitmo).⁶ But it was the prison at Abu Ghraib that became, literally, the picture of abuse.⁷

⁵ McGeary, *supra* note 4, at 34.

⁶ See, e.g., Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogation: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A01 (According to one national security official who has supervised the capture and transfer of accused terrorists, “[i]f you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.”). At some overseas facilities, including the Bagram Air Base outside Kabul, Afghanistan, and on Diego Garcia (an island in the Indian Ocean that the United States leases from Britain), American due process does not apply when the CIA interrogates suspected terrorists. *Id.* See *Ends, Means and Barbarity*, ECONOMIST, Jan. 9, 2003 available at http://www.economist.com/displaystory.cfm?story_id=1522792 [hereinafter *Ends, Means and Barbarity*]; see also Jonathon Turley, *Rights on the Rack: Alleged Torture in Terror War Imperils U.S. Standards of Humanity*, L.A. TIMES, Mar. 6, 2003, at 17 (for months, international human rights groups have been protesting activities at the

Abu Ghraib prison, of course, was notorious long before the American infantry put it on the front pages of every newspaper. The 260-acre prison complex outside of Baghdad housed thousands of criminals and political prisoners who were undoubtedly subjected to "unspeakable torture" at the hands of Saddam Hussein.⁸

As the war in Iraq took an unexpected turn, and insurgency mounted, thousands of detainees, insurgents, common criminals, and undoubtedly many innocent Iraqis were sent to Abu Ghraib.⁹ People suspected of being involved in the insurgency, as well as those who might have knowledge of the insurgency, were detained in the prison. Military intelligence, "lacking interrogators and interpreters to make precise distinctions in an alien culture and hostile neighborhoods, . . . reverted to rounding up any and all suspicious-looking persons—all too often including women and children."¹⁰ By October 2003, Abu Ghraib housed up to 7000 detainees with a guard

Bagram Air Base in Afghanistan. There is evidence that two men died from excessive force during interrogations). *But see* Eric Schmitt, *There Are Ways to Make Them Talk*, N.Y. TIMES, June 16, 2002, at D1 (quoting a spokesman for Human Rights Watch that the organization believes that "the military is being very scrupulous").

A report by an independent panel reviewing Department of Defense Detention Operations detailed significant reports of abuse. More aggressive interrogation of detainees than authorized by standard interrogation tactics appears to have been ongoing throughout the conflict. As of late August 2004, there were 300 incidents of alleged detainee abuse in all of the United States detention facilities, and there were 155 completed investigations. Of those completed investigations, sixty-six resulted in a determination that detainees had been abused. INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 12-13 (2004), available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> [hereinafter PANEL REPORT]. Eight of the sixty-six abuse cases occurred at Guantanamo, three in Afghanistan, and fifty-five in Iraq. *Id.* at 13. There were five cases of detainee deaths as a result of abuse by U.S. soldiers. *Id.*

⁷ Some predict that the pictures will come to represent the war, like the pictures during the Vietnam War of self-immolating Buddhist monks. Ron Grossman, *The Rule of Pain: The Face of War*, CHI. TRIB., May 9, 2004, at C1. Not everyone found the pictures disturbing. Rush Limbaugh commented that American students do worse things at fraternity house parties. Ian Buruma, *Just Following Orders*, FIN. TIMES WEEKEND MAG., July 3, 2004, at 22.

⁸ McGeary, *supra* note 4, at 30.

⁹ The Americans decided to re-open the prison in August 2003. By the time of the abuses, there were 6000 prisoners detained there. McGeary, *supra* note 4, at 30-31.

¹⁰ PANEL REPORT, *supra* note 6, at 29. "A Red Cross report quoted U.S. military intelligence officers as estimating that 70 percent to 90 percent of the detainees [in Iraq] had been arrested by mistake." Mike Dorning, *Prisoner Abuse Poses Peril for Bush*, CHI. TRIB., July 12, 2004, at 9.

force of only about ninety personnel from the 800th Military Police Brigade.¹¹

What is beyond dispute is that the soldiers of the 800th Military Police Brigade were understaffed, ill-equipped, and poorly supervised.¹² Conditions, moreover, were deplorable¹³ and dangerous. The complex was under constant attack from mortar raids.¹⁴

From these horrific conditions, equally horrific behavior arose. Between October and December 2003, the photographed abuses occurred.¹⁵ But the practices in Abu Ghraib go beyond those captured on film. The abuse included acts of sexual degradation such as forcing detainees to strip naked or to engage in acts of simulated fellatio.¹⁶ Other detainees were forced to masturbate in front of female soldiers,¹⁷ or threatened with rape.¹⁸ One soldier allegedly sexually assaulted a detainee with a chemical light stick or broom.¹⁹ Humiliation tactics were rampant. For example, two Army dog handlers used unmuzzled dogs to frighten Iraqi teenagers in order to force the youths to urinate or defecate on themselves.²⁰ A picture of a smiling PFC Lynndie England, holding a leash attached to a naked Iraqi man, came to represent the abusive practices.

Physical abuse also allegedly occurred, including: breaking chemical lights and pouring the phosphoric liquid on detainees, pouring cold water on naked detainees, and beating detainees with a broom handle and a chair.²¹

¹¹ PANEL REPORT, *supra* note 6, at 11.

¹² *See id.* at 11, 15.

¹³ "Basic sanitation for the troops consisted of overflowing portable toilets and soldiers jerry-rigged showers from pumps they bought themselves." McGeary, *supra* note 4, at 31. Ironically, Janis Karpinski, an Army reserve brigadier general who commanded the 800th Military Police Brigade, applauded the conditions in an interview in December 2003: "[The] living conditions now are better in prison than at home [(for the detainees)]. At one point we were concerned that they wouldn't want to leave." Seymour M. Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far Up Does the Responsibility Go?*, NEW YORKER, May 10, 2004, at 42.

¹⁴ PANEL REPORT, *supra* note 6, at 11, 74.

¹⁵ *Id.* at 5. Again, these were not the first abuses—questions about abusive practices started surfacing as soon as the prison opened in August 2003.

¹⁶ *See* McGeary, *supra* note 4, at 32.

¹⁷ James Risen, *Command Errors Aided Iraq Abuse, Army Has Found*, N.Y. TIMES, May 3, 2004, at A1.

¹⁸ Hersh, *supra* note 13, at 43.

¹⁹ Philip Shenon, *Officer Suggests Iraqi Jail Abuse Was Encouraged*, N.Y. TIMES, May 2, 2004, at A1.

²⁰ Eric Schmitt, *Abuses at Prison Tied to Officers in Intelligence*, N.Y. TIMES, Aug. 26, 2004, at A1.

²¹ Hersh, *supra* note 13, at 43.

Head blows, significant enough to render detainees unconscious, also occurred.²²

American newspapers predominantly used the word "abusive" to describe these practices, but the word "torture" was widely used around the world.²³ Finally, the "t" word was acknowledged: Major General George Fay, who headed the inquiry into Abu Ghraib, conceded in a press conference that "[t]here were a few instances when torture was being used."²⁴

The abuse, of course, might have gone unreported were it not for the courage of one soldier, Specialist Joseph Darby, an Army reservist from rural Pennsylvania, who came forward to expose the abuse.²⁵ On January 13, 2004, Darby slipped a copy of the disk of pictures under the door of the Army's Criminal Investigation Division. The next day, a criminal investigation was launched.²⁶ Shortly thereafter, Secretary of Defense Donald Rumsfeld informed General Sanchez and ordered an investigation by

²² Bill Gertz, *27 Tied to Iraqi Prisoner Abuses*, WASH. TIMES, Aug. 26, 2005 at A1. Recent investigation suggests that the number of ghost detainees at the Iraqi prison may be as high as 100. See Josh White, *Army, CIA Agreed on 'Ghost' Prisoners*, WASH. POST, Mar. 11, 2005, at A16. ("Top military intelligence officials at the Abu Graib prison came to an agreement with the CIA to hide certain detainees at the facility without officially registering them, according to documents obtained by The Washington Post. Keeping such 'ghost' detainees is a violation of international law . . . Defense Department officials have said that there were as many as 100 ghost detainees held in prison in Iraq")

²³ See Will Dunham, *Army Probe Finds Torture in Iraq*, TORONTO STAR, Aug. 26, 2004, at A22.

²⁴ Schmitt, *supra* note 20. See also Bill Marvel, *Who Says It's Torture: One Person's Discomfort Is Another's Complete Degradation and Another's Weapon Against Terror*, DALLAS MORNING NEWS, June 13, 2004, at H1 (citing Professor of International Human Rights Law Marjorie Cohn who stated that the behavior at Abu Ghraib was clearly severe enough to rise to the level of torture). Cf. John Hendren, *Guantanamo Detainees Expected to Claim Torture*, L.A. TIMES, Aug. 18, 2004, at A19 ("Four detainees . . . who will face U.S. military commission proceedings are expected to claim that the government obtained confessions and other evidence through coercive techniques, including torture").

²⁵ Mark Mazzetti et al., *Pressing Inmates for Intel*, U.S. NEWS & WORLD REPORT, May 17, 2004, at 33. Not much is known about Darby's fate recently, since he has been under a gag order for the last three months. Wil S. Hylton, *The Conscience of Joe Darby: They Shut Him Up. Fast Up*, GENTLEMAN'S QUARTERLY, Sept. 1, 2004, at 366.

CBS showed some courage in broadcasting the pictures. News organizations debated whether to reproduce the photos. Some newspapers, including the *Baltimore Sun*, published the photos because they realized that the pictures were necessary to convey the full story. Thom Shanker & Jacques Steinberg, *Bush Voices "Disgust" at Abuse of Iraqi Prisoners*, N.Y. TIMES, May 1, 2004, at A1.

²⁶ McGeary, *supra* note 4, at 29.

Major General Arturo Tagaba. While these investigations were proceeding, on April 28, 2004, the images were aired around the world on the television show, *60 Minutes II*.

Immediately after the pictures were released to the public, the Administration was quick to blame the incidents on a few bad eggs, hi-jinks by a sadistic renegade group engaged in "Animal House-type" behavior.²⁷ Six members of the 800th Military Police Brigade were arrested and faced courts-martial on various charges of abusing the prisoners.²⁸

Those reservists who had engaged in the abuse, however, insisted that they were responding to orders from higher-ups to "soften up" the detainees for interrogation. No criminal charges were initially filed against anyone up the chain of command. Two final reports commissioned by the Pentagon, however, found that the reservists' claims were in part accurate.²⁹ The

²⁷ See Richard Serrano, *Pentagon Cites Widespread Involvement in Prison Abuses*, L.A. TIMES, Aug. 26, 2004, at 1 ("From the earliest stages of the prison scandal, top Bush administration officials have sought to portray the abuse as work of a renegade band of night-shift MPs."). See also CNN.com, *General: Some Abu Ghraib Abuse Was Torture*, Aug. 26, 2004, <http://www.cnn.com/2004/US/08/25/abughraib.report/index.html> (General Schlesinger called the night shift like "Animal House," referring to National Lampoon's *Animal House*, a 1978 comedy about an unruly fraternity). Others tried to minimize the abuse by amazingly comparing it (favorably) to the torture under Saddam Hussein. Andrew C. McCarthy, *Torture: Thinking About the Unthinkable*, AM. JEWISH COMM. COMMENT, July 14, 2004, at 17 (a Justice Department official argued that the prison under American malefactors was a day at the beach compared with the prison under Saddam Hussein). See also Buruma, *supra* note 7, at 22.

²⁸ *Photos Show U.S. Troops Apparently Abusing Iraqis*, L.A. TIMES, Apr. 29, 2004, at A8. The six who faced prosecution in Iraq are Staff Sergeant Ivan "Chip" Frederick II, Specialist Charles Graser, Sergeant Javal Davis, Specialist Megan Ambuhl, Specialist Sabrina Harman, and Private Jeremy Sivitz. "A seventh suspect, Private Lyndee England, was reassigned to Fort Bragg, North Carolina after becoming pregnant." Seymour M. Hersh, *Torture at Abu Ghraib: American Soldiers Brutalized Iraqis. How Far Does Responsibility Go?*, NEW YORKER, May 10, 2004, at http://www.newyorker.com/fact/content/?040510fa_fact. As of September 12, 2004, of the seven prison guards charged, Specialist Jeremy Sivitz has pled "guilty to four counts of abuse at his court-martial and was sentenced to a year in prison, reduction in rank and a bad-conduct discharge." Patrick McDonnell, *The Conflict in Iraq: Military Intelligence Soldier Sentenced in Abu Ghraib Case*, L.A. TIMES, Sept. 12, 2004, at A9. Sivitz is expected to testify against some of the alleged ringleaders. *Id.* Recently, Specialist Armin J. Cruz pled guilty and agreed to testify against others. *Id.*

²⁹ "An investigation by Army Maj. Gen. George R. Fay and Lt. Gen. Anthony R. Jones looked into the role of military soldiers and officers at Abu Ghraib Another panel, headed by former Defense Secretary James R. Schlesinger, reviewed the role of top Pentagon officials in the scandal." Emma Schwartz, *Independent Panel on Abu Ghraib Is Urged*, L.A. TIMES, Sept. 9, 2004, at A3.

There have been significant criticisms of the reports, including that the scope of inquiry was too limited and that the composition of the panels was biased. Mark Steel, *All*

Pentagon report affirmed that "culpability extended far beyond a handful of low-level military police personnel, to include military intelligence soldiers in Iraq and up the chain of command in the Persian Gulf to the highest levels in Washington."³⁰ The report faulted General Richard Myers, the chairman of the Joint Chiefs of Staff, and General John Abizaid, the top military commander in the Middle East, for failing to plan for the insurgency that caught Americans off-guard, criticized the commanding general in Iraq, Lieutenant General Ricardo Sanchez, for not taking stronger action in November when he became aware of some of the problems in the prison, and chastised Brigadier General Janis Karpinski, who was in charge of the military brigade guarding the prison, for weak leadership.³¹

Reluctance to confront the truth about the atrocities was no longer an option once the pictures aired. Although forced to openly address the stark evidence of abuse, the Bush Administration tried to turn the attention to its advantage. Donald Rumsfeld, who had never spoken to Congress or the President, much less the public, about the abuse prior to its television airing now claimed that "[o]ur openness about [the prison abuse] is a lesson about the rule of law."³² Even the President chimed in that "[a] dictator wouldn't be answering questions about this."³³

Yet, the toughest questions have yet to be addressed adequately. What exactly is the responsibility of the Bush Administration for the abuse? And what can we learn from Abu Ghraib, so that American soldiers never again engage in such horrific acts?

This Cynical Gymnastics Is Torture, THE INDEP., Aug. 26, 2004, at 31 (criticizing the panels because Rumsfeld picked the members himself). See also Deborah Pearlstein, *Getting to Ground Truth, Investigating U.S. Abuses in the "War on Terror,"* Sept. 2004, at 2 available at http://www.humanrights.first.org/us_law/PDF/detainees/Getting_to_Ground_Truth.090804.pdf. The American Bar Association and others have called for an independent, bipartisan commission along the lines of the 9/11 Commission to look into abuses of detainees. See Douglass Cassell, *Schlesinger Report: Abu Ghraib Lite*, CHIC. DAILY LAW BULL., Aug. 27, 2004, at 5.

³⁰ Schmitt, *supra* note 20, at A1. See also Marty Logan, *Politics: Victim's Lawyers Say Abu Ghraib Reports Help Their Case*, INTER PRESS SERVICE, Aug. 31, 2004 (fifty-four military intelligence, MPs, medical soldiers, and civil contractors were found to have some degree of responsibility and complicity in the abuse).

³¹ PANEL REPORT, *supra* note 6, at 44. Karpinski has been reassigned and no longer runs the prison. James Risen, *G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15.

³² McGeary, *supra* note 4, at 34.

³³ *Id.*

II. LESSONS OF ABU GHRAIB

A. Lesson Number One: Any Moral Ambiguity Concerning the Use of Torture Promotes an Environment Conducive to the Use of Torture

As previously mentioned, the formal reports that evaluated Abu Ghraib laid the blame for the abuse on a variety of causes, particularly poor training of soldiers, poor oversight, and horrendous conditions.³⁴ Undoubtedly, these factors played a major role in facilitating the abuse. Correcting these conditions is imperative. But, to end the introspection there would be a mistake. My point is that the soldiers' willingness to utilize torture and torture-like tactics had a more basic, subtler cause. It is attributable, at least in part, to the failure of the Bush Administration to absolutely, unequivocally, and without exception condemn the use of torture or inhumane practices. To the contrary, since 9/11, the government implicitly condoned whatever was necessary to fight the war on terror.³⁵ A message that the ends justified the means in the war on terrorism generally, and during interrogation specifically, was undoubtedly conveyed down the lines of command.³⁶ Abusive practices, when they did inevitably occur, were at best ignored and at worst tolerated. And finally, the use of extreme interrogation tactics was considered by the executive branch, if not outright embraced.

Thus, my argument here is twofold. First, the general policies of the Bush Administration in fighting the war on terror created an environment that nurtured torture. Second, the Administration's "policy" against torture was ambiguous at best, creating an atmosphere conducive to aggressive, if not abusive, interrogation methods. Each of these arguments is considered below.

³⁴ PANEL REPORT, *supra* note 6, at 10–12, 14–17, 27–31, 36–38, 43–52, 66–70, 74–77. According to the report, "Abu Ghraib was seriously overcrowded, under-resourced, and under continual attack." *Id.* at 11.

³⁵ "There was a before-9/11 and an after-9/11," the CIA's former counterterrorism chief told Congress in testimony in early 2002. "After 9/11, the gloves came off." Dornig, *supra* note 10, at 9.

³⁶ See, e.g., Hendrik Hertzberg, *Terror and Torture*, NEW YORKER, Mar. 24, 2003, at 29 (calling torture the official, though, of course, unacknowledged policy of the United States).

1. *The Bush Administration's War on Terror: The Ends Justify the Means*

The Bush Administration's general approach to the war on terrorism created an atmosphere conducive to human rights violations. Engaged in an all-out battle of good versus evil, the Administration subtly, and not so subtly, promoted an "ends justify the means" mentality.³⁷ As Vice President Cheney stated in his first interview after 9/11: "It's going to be vital for us to use any means at our disposal, basically, to achieve our objective."³⁸ President Bush repeatedly insisted that this "new" war on terrorism ushered in a new paradigm, a "new way of thinking" in the law of war.³⁹ This new thinking by the Administration revolved around doing *whatever* was necessary to win the war.⁴⁰

And use any means they did. Many human rights activists have accused the Bush Administration of flouting international law in its treatment of detainees. The open-ended detention of captives and the denial of due process rights, including the right to hearing and counsel, are examples of this mentality. Even President Bush's insistence that he believed he had the authority under the Constitution to deny protections of the Geneva Convention to combatants detained during the war in Afghanistan (though he declined to exercise that power at this time) exemplifies this way of thinking.⁴¹

Of course, two of President Bush's most grandiose assertions of unlimited power were recently rejected by the Supreme Court. In July 2004, the Supreme Court, by a vote of six to three, rejected the President's claim of absolute power to detain non-Americans at Guantanamo Bay without any

³⁷ "Human rights groups and many military experts say the Administration's approach to prosecuting the war on terrorism . . . may have created a climate that fosters abuse." McGeary, *supra* note 4, at 34.

³⁸ Amanda Ripley, *Redefining Torture*, TIME, June 21, 2004, at 49, 50.

³⁹ President George W. Bush, President Unveils "Most Wanted" Terrorists (Oct. 10, 2001), available at <http://www.whitehouse.gov/news/releases/2001/10/20011010-3.html>.

⁴⁰ See SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB 60 (2004) (quoting a Pentagon consultant: "The issue is that, since 9/11, we've changed the rules on how we deal with terrorism and created conditions where the ends justify the means."). Cf. Paul Vallyely, *The Invisible*, THE INDEP., June 26, 2003, at 2 ("There is a new tolerance [after 9/11] of the suspension of due legal process . . . of imprisoning unconvicted suspects in harsh conditions . . . Such shifts are not restricted to the U.S. All over the globe . . . [t]he rhetoric of the 'war on terror' is everywhere being used by governments as the pretext for untrammelled action against rebels and dissidents.").

⁴¹ Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed*, WASH. POST, June 23, 2004, at A1.

judicial review.⁴² And the Court overwhelmingly rejected the President's denial of due process to Yaser Esam Hamdi, a United States citizen held virtually incommunicado for almost two years without seeing a lawyer.⁴³

Despite these legal setbacks, the Administration consistently and explicitly embraced and reiterated a policy that "anything goes" in this war on terror. Moreover, it did so in terms that tremendously de-personalized the enemy as the "evil-doers" and "evil ones."⁴⁴ That soldiers would take this message as an implicit sanction for torture if necessary to fight the war is not surprising. As Professor of Human Rights Ian Buruma wrote:

Lyndie England's character . . . is irrelevant. What made her deeds possible was a political culture created in Washington D.C. If White House and Pentagon lawyers seek ways to circumvent the Geneva conventions, if torture is deemed to be permissible if the US President says so, if that same President divides the world into good guys and evil guys . . . if it is unclear in Iraq who the enemies are, then it becomes hard to blame Lynndie England The problem is not cultural, or personal, but political.⁴⁵

Or, as another writer put it: "[There was] a sense throughout the government and the military that the 'war on terrorism' was a different kind of conflict, one in which normal rules, such as treatment of detainees as required by the Geneva Conventions, did not necessarily apply."⁴⁶

⁴² *Rasul v. Bush*, 542 U.S. 466 (2004).

⁴³ *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁴⁴ Consistent references by President Bush to the "evil ones," to a world of "us versus them," makes it more likely that torture would occur. See Olivia Ward, *Shining a Light into Dark World of Torture*, TORONTO STAR, May 23, 2004, at A01 ("[The] pattern to the way people are led to practice torture . . . involves authorization to act and dehumanization of the victims . . . a world of 'them and us.'") (statement of Prof. Ronald Crelinsten).

⁴⁵ Buruma, *supra* note 7, at 22. See also the following statement by John Hutson, Dean of Franklin Pierce Law Center, and a former Judge Advocate General of the Navy: "It's pretty clear . . . what the atmosphere is It goes from the administration to the generals to the colonels to the majors to the captains and lieutenants. And pretty soon, that's the message all around: These are terrorists and different rules apply." Dornig, *supra* note 10, at 9.

⁴⁶ Jim Lobe, *Prisoner Abuse Scandal Rocks Legal, Medical Worlds*, INTER PRESS SERVICE, Aug. 6, 2004. See also Kerry Kennedy Cuomo & Michael Posner, *Rumsfeld's Actions Speak Louder*, BOSTON GLOBE, May 15, 2004, at A15 ("There is law, and then there is war. In this new kind of war against terrorism, law has no particular place. This is a radical doctrine, and the horrors at Abu Ghraib are an almost inevitable consequence.").

2. *The Administration's Policy on Torture*

An atmosphere conducive to the use of torture was not only created by the Administration's general policies in fighting the overall war against terror. The Administration's approach to interrogation of detainees and prisoners also allowed abusive tactics to flourish. It is not my contention that the President, or indeed, that anyone in the Administration ordered the specific practices on the specific detainees captured on film in Abu Ghraib.⁴⁷ Rather, I argue that the Administration at best sent conflicting signals, creating a belief that abusive behavior towards the "evil-doers" was acceptable.⁴⁸ And policies adopted by the Administration at least opened the door to utilizing torture in certain interrogation contexts. The end result: moral ambiguity between words and deeds that implicitly, if not explicitly, condoned aggressive interrogation practices and, ultimately, torture.

In this section, I consider four specific arguments for my overall position that the Bush Administration was at best morally ambivalent towards torture and at worst, condoned it. First, I argue that while the Bush Administration insisted that its soldiers were following the law, the Administration ignored abuses and failed to condemn them in a timely manner, leading to ambiguity about the government's position. That ambiguity was furthered by separate memoranda prepared by the Justice and Defense Departments that together advocated a strained definition of torture, and suggested that the President had inherent power as commander-in-chief to order the use of torture during interrogation. Those memoranda are addressed in my second section. Third, I consider the actions taken by the Secretary of Defense, Donald Rumsfeld, who relied upon those memos to authorize interrogation tactics which many would consider inhumane, to take place inside Guantanamo Bay. These tactics ultimately found their way to Afghanistan and then to the prisons of

⁴⁷ Some journalists and commentators have accused high-level Administration officials, particularly Donald Rumsfeld, of direct involvement. See, e.g., HERSH, *supra* note 40, at 46.

Professor Charles Brower suggested that "it seems unlikely that the perpetrators of rogue acts would systematically record their misconduct on film. It seems even more improbable that President Bush would respond to isolated misconduct by pledging, as he did on May 24 to demolish the 'Abu Ghraib prison.'" Charles H. Brower II, *The Lives of Animals, the Lives of Prisoners, and the Revelations of Abu Ghraib*, 37 VAND. J. TRANSNAT'L L. 1353, 1369 (2004).

⁴⁸ See Sullivan, *supra* note 4 ("The message sent [by Bush] was: these prisoners are beneath decent treatment, but we should still provide it. That's a strangely nuanced signal to be giving the military during wartime [The ultimate message was that detainees should be] treated humanely and to the extent appropriate and consistent with military necessity The president's underlings got the mixed message [And, at some point,] the broader mixed message sent from the White House clearly reached commanders in the field.") (emphasis in original).

Iraq. Finally, the practice of sending a suspect to an allied foreign nation that practices torture and its role in creating an atmosphere conducive to an acceptance of torture by U.S. soldiers is addressed.

All of these actions, singly and in combination, lend support to the conclusion that the Bush Administration created an environment that allowed torture and abuse to flourish. Even the Final Report on Abu Ghraib commissioned by the Administration acknowledged that many of those committing the abuse believed that harsh tactics were generally employed by the United States military and were condoned:

many well-intentioned professionals, attempting to resolve the inherent moral conflict between using harsh techniques to gain information to save lives and treating detainees humanely, found themselves in uncharted ethical ground, with frequently changing guidance from above. Some stepped over the line of humane treatment accidentally; some did so knowingly. Some of the abusers believed other governmental agencies were conducting interrogations using harsher techniques than allowed by the [leading Army manual on interrogation], a perception leading to the belief that such methods were condoned.⁴⁹

Although not indicting the Administration itself, the Schlesinger report ultimately assigns blame for Abu Ghraib to high-level officials: “[T]he abuses were not just the failure of some individuals to follow knowing standards, and they are more than a failure of a few leaders to enforce proper discipline. There is both institutional and personal responsibility at higher levels.”⁵⁰ Others link the abuse more explicitly to the Administration’s policies. As Professor Dershowitz writes:

Abu Ghraib occurred precisely because US policy consisted of rampant hypocrisy: our President and Secretary of Defence publicly announced an absolute prohibition on all torture, and then with a wink and a nod sent a clear message to soldiers to do what you have to do to get information and to soften up suspects for interrogation.⁵¹

⁴⁹ PANEL REPORT, *supra* note 6, at 29–30. “For example, the use of painful stress positions, nudity and military working dogs were not approved tactics for interrogations—yet they were endorsed by Lt. Gen. Ricardo Sanchez’ command.” Josh White, *Abuse Report Widens Scope of Culpability*, WASH. POST, Aug. 26, 2004, at A01.

⁵⁰ PANEL REPORT, *supra* note 6, at 5.

⁵¹ Alan Dershowitz, *When Torture is the Least Evil of Terrible Options*, TIMES HIGHER EDUC. SUPP., June 11, 2004, at 20.

Or, as Professor Koh succinctly states: "Somehow a message was sent that there was a culture of tolerance for torture."⁵²

a. *A Failure to Condemn*

After September 11, it was common to read in the paper about a "high ranking official" suggesting that "aggressive" interrogation techniques were necessary and were being utilized in the war on terror.⁵³ For example, the *Washington Post* quoted an "official who supervised the capture of accused terrorists" as saying that "[i]f you don't violate someone's human rights some of the time, you probably aren't doing your job. I don't think we want to be promoting a view of zero tolerance on this."⁵⁴ A western intelligence official described an interrogation of a high-ranking al Qaeda operative as "not quite torture, but about as close as you can get."⁵⁵ Others virtually joked about playing "smack-y-face" with detainees to get information.⁵⁶

These suggestions that interrogation tactics should skirt the line of legality, and that quite likely they were doing so, should have brought a forceful and unequivocal response from the Administration. As Dean Harold Koh pointed out:

If a CEO of a major multinational company reads in a paper a statement from a manager that "If we're not discriminating against employees on the basis of race, we're not doing our job," then he would have a pretty clear duty to investigate and send word down the line that such a culture of disrespect for rights would not be tolerated.⁵⁷

⁵² *Morning Edition* (NPR radio broadcast June 24, 2004). See also Mark Bowden, *Lessons of Abu Ghraib*, ATLANTIC MONTHLY, July 11, 2004, at 37, 40 ("The President has spoken out against torture, but his equivocations on the terms of the Geneva Convention suggest that he perceives wiggle room between ideal and practice.").

⁵³ See, e.g., Priest & Gellman, *supra* note 6, at A14 ("While the U.S. government publicly denounces the use of torture, each of the current national security officials interviewed for this article defended the use of violence against captives as just and necessary.").

⁵⁴ Peter Slevin, *U.S. Pledges to Avoid Torture Terror Suspects*, WASH. POST, June 27, 2003, at A11.

⁵⁵ Don Van Natta, *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1 ("The official said that over a three-month period, the suspect was fed very little, while being subjected to sleep and light deprivation, prolonged isolation and room temperatures that varied from 100 degrees to 10 degrees.").

⁵⁶ See John T. Parry, *What Is Torture, Are We Doing It, And What if We Are?*, 64 U. PITT. L. REV. 237, 237 (2003).

⁵⁷ Dornig, *supra* note 10, at 9.

Such a response was lacking here. Rather, the years leading up to Abu Ghraib, and even the months preceding the televised exposure of the photos indicate more of a “don’t ask, don’t look” policy toward potential abuses than a real desire to monitor and prevent human rights violations. Reports by detainees and human rights organizations, like Amnesty International and the International Red Cross, of torture and abuses were virtually ignored or minimized.⁵⁸ As Senator Patrick Leahy wrote, “It is . . . clear that U.S. officials knew the law was being violated [during interrogations] and for months, possibly years, did virtually nothing about it.”⁵⁹ Even a government-commissioned report on Abu Ghraib received little attention until the photos were exposed to the world.⁶⁰ Perhaps the most disturbing evidence of this mindset was Donald Rumsfeld’s long initial silence on the Abu Ghraib photographs. “His failure to alert the President or congressional leaders before the photos became public—and he *knew* they were going to become

⁵⁸ A report by the Red Cross, for example, was sent to the Administration in February 2004, stating that abuses against thousands of Iraqis were not isolated incidents but systematic, particularly during interrogation. *Terror, Torture and the Political Consequences: A Ghastly Week*, *ECONOMIST*, May 15, 2004, at 19. “Prisoners were at high risk of being subjected to ‘a variety of harsh treatments, ranging from insults, threats and humiliations to both physical and psychological coercion, which in some cases was tantamount to torture.” *Id.*; see also Hertzberg, *supra* note 36, at 29 (“But for some time there have been reliable reports of American interrogators subjecting terror suspects to what the C.I.A. calls ‘stress and duress’ techniques.”). As Professor Charles Brower noted:

[I]t becomes clear that, since the first days of Ambassador Bremer’s tenure in Baghdad, the United States received a steady flow of credible information regarding the inhuman treatment of Iraqi prisoners. To their credit, Bremer and Secretary of State Powell discussed such allegations in meetings with Secretary Rumsfeld, President Bush, and the White House Staff. After receiving the Pentagon’s assurances that it was ‘on the case,’ however, the White House did nothing to follow up. Thus, while parts of the ‘system’ swiftly identified and responded to allegations of inhuman treatment, other parts of the system plainly—perhaps even criminally—failed.

Brower, *supra* note 47, at 1376–68.

⁵⁹ Sen. Patrick Leahy, *There Is No Justification for Torture*, *BOSTON GLOBE*, June 28, 2004, at A11.

⁶⁰ See, e.g., Risen, *supra* note 17 (General Myers, chairman of the Joint Chiefs of Staff, conceded in May that “he had not yet read a classified, 53-page Army report completed in February by Maj. Gen. Antonio M. Taguba” on the abuse in Iraq. A spokesman for Secretary Rumsfeld admitted he had not yet been briefed on Taguba’s report). “Human-rights groups have issued condemnations [of human rights violations], and other commentators have expressed dismay. But, so far at least, congressmen have not been demanding investigations.” *Ends, Means and Barbarity*, *supra* note 6.

public—leads one to conclude that he didn't think they were a very big deal."⁶¹

Of course, it wasn't only the Administration that turned its back on stories of abuse. Members of Congress and the public "simply went on with [their] lives as if [the prisoners] had nothing to do with us."⁶² Until forced to face the music, so to speak, by the broadcast of the pictures, most Americans and their leaders were content to turn away.⁶³

Concededly, there were the occasional statements by an Administration official, or by President Bush himself, denying that the United States engaged in torture.⁶⁴ Most of the actions and words of the Administration,

⁶¹ Bowden, *supra* note 52, at 37 (emphasis added). See also HERSH, *supra* note 40, at 64 ("One puzzling aspect of Rumsfeld's account of his initial reaction to news of the Abu Ghraib investigation was his lack of alarm and lack of curiosity. One factor may have been recent history: there had been many previous complaints of prisoner abuse from organizations like Human Rights Watch and the International Committee of the Red Cross . . . and the Pentagon had weathered them with ease.").

⁶² Sanford Levinson, *Brutal Logic*, VILLAGE VOICE, May 18, 2004, at 27; accord Stuart Taylor, *The Perils of Torturing Suspected Terrorists*, NAT'L J., May 8, 2004, at 1389 (noting that Bush and Rumsfeld ignored the abuse, while Congress and the public averted their eyes).

Even the media has come under attack for not "pushing" the issue earlier. See Jim Lobe, *Politics-U.S.: Prisoner Abuse Scandal Rocks Legal, Medical Worlds*, INTER PRESS SERVICE, Aug. 16, 2004 (media failed to follow up on possible abuse until the *60 Minutes II* broadcast).

⁶³ Unfortunately, it appears that such complacency is again asserting itself.

Though the revelations of Abu Ghraib transfixed Americans for a time, in the matter of torture not much changed. After those in Congress had offered condemnations and a few hearings distinguished by their lack of seriousness; after the Administration had commenced the requisite half-dozen investigations, none of them empowered to touch those who devised the policies; and after the low-level soldiers were placed firmly on the road to punishment—after all this, the issue of torture slipped back beneath the surface.

Danner, *supra* note 4; accord Joseph Lelyveld, *Interrogating Ourselves*, N.Y. TIMES, June 12, 2005, at F36 ("For all the genuine outrage in predictable places over . . . [the] 'torture scandal' . . . the usual democratic cleansing cycle never really got going. However strong the outcry, it wasn't enough to yield political results in the form of a determined [c]ongressional investigation, let alone an independent commission of inquiry Members of Congress say they receive a negligible number of letters and calls about the revelations that keep coming.").

⁶⁴ After Abu Ghraib, President Bush emphatically rejected that the United States condones torture: "Let me make very clear the position of my government We do not condone torture. I have never ordered torture. I will never order torture. The values of this country are such that torture is not part of our soul" Richard Serrano & Richard B. Schmitt, *Files Show Bush Team Torn Over POW Rules*, L.A. TIMES, June 23, 2004, at A10.

however, belied this conclusion. As just discussed, the Administration pointedly ignored abuses and equivocated on the appropriateness of torture. Such behavior created an atmosphere that permitted abuse to flourish. There is, however, evidence that at least some influential members of the Administration went even further and actually condoned torture. A report by the Justice Department sets forth a vehement legal defense of the use of torture. This memorandum, and others like it, are considered in the next section.

b. *The Bybee (and Other) Memorandum*⁶⁵

Further evidence that the Administration tolerated significant interrogation abuses comes from the Memorandum on Torture prepared by the Justice Department in August 2002. In the summer of 2002, the Counsel to the President had asked the Department of Justice Office of Legal Counsel for an opinion on the standards of conduct for interrogations and the applicability of the Convention Against Torture.⁶⁶

The Memorandum, prepared by a number of lawyers, most prominently Jay Bybee, head of the Office of Legal Counsel, stated that interrogation methods that comply with relevant domestic law do not violate the

In light of the Justice Department's memo narrowly defining U.S. legal obligations and even torture itself, see *infra* notes 65–93 and accompanying text, the statements that the United States does not condone torture and follows the law may not provide much comfort. See *Our Opinions: Bush's Legalistic Evasions About Torture Set a Dangerous Example for U.S. Forces and the World*, ATLANTA J.-CONST., June 16, 2004, at A16 [hereinafter *Bush's Legalistic Evasions*].

⁶⁵ Originally, Attorney General John Ashcroft refused to release the memorandum when questioned about it by Congress. The memo, however, was leaked in full to *The Washington Post*. *Shameful Revelations Will Haunt Bush*, ECONOMIST ONLINE, June 18, 2004, [available at](http://www.economist.com/agenda/displayStory.cfm?story_id=2771643) http://www.economist.com/agenda/displayStory.cfm?story_id=2771643 [hereinafter *Shameful Revelations*].

⁶⁶ PANEL REPORT, *supra* note 6, at 7. At least one author provides a more nefarious explanation for the memo's existence. According to attorney and reporter Stuart Taylor Jr.:

In late 2001 and early 2002, the CIA began using coercive methods to get information out of captured al Qaeda leaders overseas. But concerns were raised about legal jeopardy and the risk of a public trashing . . . [s]o the [then] CIA director George Tenet demanded a legal memo from the Justice Department's Office of Legal Counsel . . . promising interrogators and their bosses the broadest possible presidential protection from any future prosecution for torture.

Stuart Taylor, *A Failure of Leadership: Bush's Overreaching Has Hurt Him at the Supreme Court and in Way on Terrorism*, LEGAL TIMES, July 5, 2004, at 54.

Convention on Torture.⁶⁷ First, it defined torture so narrowly that few acts clearly fall within the scope of that term. It held that torture includes only the most extreme acts that were specifically intended to inflict severe pain that is difficult to endure. More particularly, the “[p]hysical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”⁶⁸ Mental pain or suffering can amount to torture only if it “result[s] in significant psychological harm of significant duration, e.g. lasting for months or even years.”⁶⁹

Besides providing this extremely narrow definition of torture, the Bybee Memo goes on to suggest that the Commander-in-Chief, exercising his wartime powers, may order torture. In other words, even though the United States criminalizes torture, and has signed an international treaty outlawing it, interrogators lawfully could torture prisoners so long as the President authorized it.⁷⁰ The President, according to the memorandum, “enjoys complete discretion in the exercise of his Commander-in-Chief authority,” including control over interrogations, which is “a core function[] of the Commander-in-Chief.”⁷¹ As the report concludes: “In light of the President’s complete authority over the conduct of war . . . the prohibition against torture . . . must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority.”⁷² Or, as one attorney describes the memorandum’s incredible conclusions in rather blunt language:

[According to the memo], the Constitution empowers the president to give blanket authorization for yanking fingernails, branding genitals with red hot poker, or holding suspects under water almost to the point of drowning. He may do this despite the unambiguous prohibitions both in the Senate ratified torture convention that the Reagan administration first signed on to . . . and

⁶⁷ Jay S. Bybee, Memorandum for Alberto R. Gonzales re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A 1 (Aug. 1, 2002), in *THE TORTURE PAPERS, THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Bybee Memo]; see also The Convention Against Torture and other Cruel and Degrading Treatment (CAT) has been ratified by 118 state parties, including the United States. See G.A. Res 39/46, 39 U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter Convention Against Torture]; see generally Andrea Montavon-McKillip, *CAT Among Pigeons: The Convention Against Torture. A Precarious Intersection Between International Human Rights Law and U.S. Immigration Law*, 44 ARIZ. L. REV. 247, 251 (2002).

⁶⁸ Bybee Memo, *supra* note 67.

⁶⁹ *Id.*

⁷⁰ *Id.* at 2, 31–39.

⁷¹ *Id.* at 33, 38.

⁷² *Id.* at 34.

in the congressionally adopted implementing legislation that President Bill Clinton signed in 1994. And George W. Bush's [hypothetical] approval of such torture need not even be specific to a particularly important detainee He could, the report implies, authorize torture of all suspected enemy combatants.⁷³

This model of the President as an absolute Commander-in-Chief, above all law, including international law, is indeed revolutionary and blatantly contradicted by the language of the Constitution and of Supreme Court precedent.⁷⁴ As Stuart Taylor notes,

These perversions of the law would allow Bush to seize, imprison, and torture anyone in the world at any time, for any reason that he associates with national security. Little did the Framers suspect that their Constitution would be twisted by a president to claim powers more appropriate to Roman emperors, Russian czars, and King George III.⁷⁵

Even if the President does not authorize torture, the memorandum suggests that any interrogators prosecuted for engaging in torture could argue necessity or self defense as justifications to eliminate any criminal liability.⁷⁶ They could be prosecuted, the memo suggests, only if it were shown that their main intent was to inflict pain. If, however, the interrogator intended to extract information, there would be a defense: "[If a U.S. interrogator] were to harm an enemy combatant during an interrogation . . . he would be doing so in order to prevent further attacks on the United States [This

⁷³ Stuart Taylor, *It's Not Really Torture If . . . : The President's Lawyers Warp the Law*, LEGAL TIMES, June 14, 2004, at 68.

⁷⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); see also Kathleen Clark & Julie Mertus, *Torturing the Law: The Justice Department's Legal Contortions on Interrogation*, WASH. POST, June 20, 2004, at B03 (the Bybee Memo's Commander-in-Chief argument "flies in the face of years of Supreme Court precedent in which the Court has repeatedly rejected expansive claims of unilateral control by the executive branch."). Stuart Taylor argues that the lawyers writing the memorandum "were reluctant to make such a sweeping claim for presidential power. But they succumbed to pressure from superiors." Taylor, *supra* note 66. See also the following Statements by Allen Weiner, professor at the Stanford Institute for International Studies and an ex-State Department attorney: "The constitutional analysis on the president's power was the most shocking thing. These are totally new powers. These are very bald-faced and categorical assertions. Federal criminal laws become inapplicable." James Sterngold, *Legal Experts Slam Torture Policy Process: White House Rebuffed Memo Saying Bush Could Be Above Law*, S.F. CHRON., June 24, 2004, at A8.

⁷⁵ Taylor, *supra* note 73, at 68.

⁷⁶ *Id.*

interrogator's] actions [would be] justified by the executive branch's constitutional authority to protect the nation from attack."⁷⁷

An analogous memorandum—and one equally flawed—was written in January 2002 by William Haynes II, general counsel of the U.S. Department of Defense, and Deputy Assistant Attorney General John Yoo.⁷⁸ In this memorandum, the authors maintained that “neither the Third nor Fourth Geneva Conventions protected Al Qaeda and Taliban detainees captured in Afghanistan.”⁷⁹ Geneva III protects prisoners of war from physical and mental torture or from any other form of coercion to secure information. Neither did common article Three to the Conventions (which forbids cruel treatment and torture, including humiliating treatment), nor the federal war crimes, nor customary international laws of war, limit the United States.⁸⁰ White House Counsel Alberto Gonzales relied on this advice in his recommendation to President Bush; President Bush accepted the recommendation.⁸¹

These memoranda also have been widely criticized for their reasoning. Professor Gillers goes further to suggest that the lawyers breached their ethical obligation to provide balanced advice to the client, rather than tell the client what the client wants to hear.⁸² To reach the desired conclusions, the memos ignored duties imposed by the Convention Against Torture, and the federal torture statute, which creates criminal liability for American nationals who commit torture abroad under color of law.⁸³ The State Department obviously agreed that the memorandum provided poor advice. “When Powell

⁷⁷ Bybee Memo, *supra* note 67, at 46. This is clearly contrary to international law, which provides that torture for the intent of obtaining information is still prohibited torture. See *infra* note 161 and accompanying text.

⁷⁸ See HERSH, *supra* note 40, at 4 (“[T]he senior legal officers in the White House and the Justice Department seemed to be in virtual competition to determine who could produce the most tough-minded memorandum about the lack of prisoner rights.”).

⁷⁹ Stephen Gillers, *Tortured Reasoning*, AM. LAW., July 2004, at 65.

⁸⁰ *Id.*

⁸¹ *Id.* But see Jeffrey K. Shapiro & Lee A. Casey, *Let Lawyers Be Lawyers*, 26 AM. LAW., Sept. 1, 2004, at 73 (defending memos and criticizing Gillers). Gonzales has since been promoted. He was nominated by President Bush and confirmed by the Senate for the office of Attorney General of the United States.

⁸² *Id.* See also Michael Dorf, *The Justice Department's Change of Heart Regarding Torture*, FINDLAW LEGAL COMMENTARY, Feb. 11, 2003, <http://writ.findlaw.com/dorf/20050105.html> (“[T]he August 2002 memo can only be described as a serious departure from longstanding OLC practice. In content and tone, the memo reads much like a document that an overzealous young associate in a law firm would prepare in response to a partner's request for whatever arguments can be concocted to enable the firm's client to avoid criminal liability.”).

⁸³ *Id.*

read the Gonzales memo, he hit the roof," according to a State Department source.⁸⁴

My point at this juncture is not that the conclusions in these memoranda are wrong, although I believe that they most certainly are.⁸⁵ Rather, my point is a more basic one: these memos are one more piece of evidence to support the conclusion that the Bush Administration did not condemn interrogation tactics that would constitute torture under international law.⁸⁶ The

⁸⁴ John Barry, et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26. At his confirmation hearing, Alberto Gonzales said he could not recall reading the series of memos from career military lawyers criticizing the new rules for interrogation. Richard Schmitt, *Senators Quiz Gonzales on Torture Policy*, L.A. TIMES, Jan. 7, 2005, at A1.

⁸⁵ More than 120 prominent lawyers and legal academics sent a letter to President Bush stating that the memos "misinterpret the U.S. Constitution and laws, international treaties and rules of international law." Noah Levitt, *How Ashcroft Tried to Narrow the Term: Defining and Redefining Torture*, COUNTERPUNCH, Aug. 25, 2004, <http://www.counterpunch.org/levitt08252004.html>; see also Lobe, *supra* note 62 (noting that the memos shocked the legal community because they were seen as far-fetched, if not outlandish, even by a number of legal experts who normally defend the administration). As one commentator pointed out, the interpretations in the memorandum "would gut the entire concept of international law, from the Geneva Conventions to bans on the use of chemical weapons. They are arguments that Saddam Hussein himself might advance as a defense for his heinous crimes." *Bush's Legalistic Evasions*, *supra* note 64. See also *The Bush Administration and the Torture Memo: What on Earth Were They Thinking?*, ECONOMIST, June 19, 2004, at 75 (the memo goes further than most ordinary opinions in defining torture); Clark & Mertus, *supra* note 74, at B03 ("[Bybee's] extreme definition departs radically from both U.S. and international understandings of the prohibition against torture.").

The Administration recently retreated from these memos at the end of 2004. The Office of Legal Counsel of the United States Department of Justice released a new memorandum. The seventeen-page document, authored by Acting Assistant Attorney General Daniel Levin,

definitively repudiates two of the most outrageous positions set forth in the August 2002 memo: the almost impossibly high threshold for finding an act of torture; and the contention that a torturer can escape criminal liability if he engages in torture with a noble goal in mind, such as to extract vital information from the torture victim.

Dorf, *supra* note 82. The memorandum, however does not repudiate the position that Congress lacks the power to prohibit torture undertaken at the behest of the President. "Although the new memo laudably declines to endorse this view, it does not formally repudiate the position either." Dorf, *supra* note 82; see also Editorial, *Palliatives for Prisoners*, WASH. POST, Jan. 5, 2005, at A16 (reporting that the appearance of new memo a week before the confirmation hearing of Gonzalez for Attorney General was not a coincidence).

⁸⁶ It also supports the position suggested earlier—that the Bush Administration embraces an "ends justifies the means" approach in the war on terrorism. See Stuart Taylor, *supra* note 73, at 68 ("These warped analyses are not just the work of a few

memoranda, at their core, are consistent with the overall “ends justifies the means” mentality embraced by the Administration in the war on terror, and they “put forward the argument that nothing is more important than obtaining ‘intelligence vital to the protection of untold thousands of American citizens.’”⁸⁷ The memoranda represent “an almost fevered discussion within the Bush Administration about whether the United States could essentially engage in behavior that others might deem torture, and still get away with it.”⁸⁸

Granted, the significance of these memoranda is a bit difficult to gauge.⁸⁹ The precise reception of the rest of the Administration to the Bybee Memo is unclear, although there is no evidence to suggest that it was repudiated at the time.⁹⁰ Certainly, neither memorandum was widely circulated outside the inner-core of the Administration, and they obviously did not reach the soldiers in the field.⁹¹ Thus, I by no means argue that these memoranda were relied on explicitly by the soldiers at Abu Ghraib to justify their actions.

lawyers carried away with clever circumvention of the law. They reflect an attitude deeply entrenched in the current White House—including Bush and Dick Cheney as well as Gonzales—that whenever the president invokes national security, he enjoys near-dictatorial powers and is quite literally above the law.”).

⁸⁷ Tim Harper, *Ashcroft Grilled over Military's Rules on Torture*, TORONTO STAR, June 9, 2004, at A01.

⁸⁸ Roland Watson, *Rumsfeld Approved Guantanamo Bay Interrogation Techniques*, TIMES (LONDON), June 24, 2004, at 16 (stating that the memos are fevered discussion about how far the United States could go). Cf. Eugene R. Fidell, President of the National Institute of Military Justice: “What [the Administration] ha[s] done is preposterous Calling the memo irrelevant is a pretty lame way of getting out of this. But the reality is that the thinking here was the foundation stone of their policy.” Sterngold, *supra* note 74, at A8.

⁸⁹ Arguably, the President may have ignored or even repudiated the memoranda. Presumably, if that was the case, the Administration would have put forth such evidence when the Bybee Memo was first exposed. Moreover, such repudiation is belied by the fact that only a few months later, Bybee was appointed to one of the top judicial spots in the country—a seat on the Ninth Circuit. See Robert Scheer, *Tout Torture, Get Promoted*, L.A. TIMES, June 15, 2004, at B13. Moreover, there is evidence that the memo informed a Pentagon report on interrogations. *Shameful Revelations*, *supra* note 65.

⁹⁰ Indeed, it is unclear even at this time if either memorandum has been repudiated. See Pearlstein, *supra* note 29, at 19. Professor Yoo continues to aggressively defend the memos. Lobe, *supra* note 62.

⁹¹ Allen & Schmidt, *supra* note 41, at A01. See also the following comments of Arizona Republican Jon Kyl:

I think the real stretch is to take a memo like the one that was written by the attorney general's office and suggest that somehow or other that legal memo found its way through to some troop on the ground in Afghanistan or Iraq, and he's reading this memo and saying, “Aha, I've got a defense if I torture this guy.”

But the memoranda undoubtedly provide strong evidence that at least some in the Administration took a breathtakingly broad view of presidential authority, and an astoundingly narrow view of the restrictions on torture imposed by international law. As one commentator concluded:

[t]he [Bybee memo and other Administration memos] alone do not prove that U.S. officials endorsed the use of torture to extract intelligence from detainees Nevertheless, they suggest that what happened at Abu Ghraib was not unique but grew out of a climate of ambiguity regarding the treatment and interrogation of prisoners that was created by an Administration determined to do whatever it takes to win the war on terrorism.⁹²

Michael Ratner, the President of the Center for Constitutional Rights, concurred: “[W]e had an administration that essentially was willing to look away from the laws that ban torture and look away from the moral issues around torture, and they issued memos that essentially opened the door [for interrogation abuses].”⁹³

Moreover, the memoranda were relied upon by the Pentagon in drafting new interrogation practices in late 2002.⁹⁴ The significance of those practices is considered in the next section.

Byron York, *A Tortured Debate: The Media-Fed Hysteria over the Treatment of the Terrorist Prisoners*, NAT'L REV., July 12, 2004, at 33.

⁹² Ripley, *supra* note 38, at 49. See also *Bush's Legalistic Evasions*, *supra* note 64, at A16. (“However, by claiming a remarkable presidential right to set aside established law and treaty whenever Bush chooses, the secret legal opinions circulating through his administration set the stage for use of torture”).

⁹³ *The Tavis Smiley Show* (NPR radio broadcast June 10, 2004).

⁹⁴ See Taylor, *supra* note 66, at 54 (Rumsfeld and the Pentagon adopted the Office of Legal Counsel Analysis). Based on the Bybee Memo, Rumsfeld approved tough interrogation techniques at Guantanamo Bay in December 2002. Editorial, *Onus at the Top*, ST. LOUIS POST-DISPATCH, Aug. 26, 2004, at B06.

c. *Secretary Rumsfeld's Approval of "Aggressive Interrogation" at Guantanamo Bay*

In the fall of 2002, military authorities evidently believed that they were not getting enough information out of the detainees at Guantanamo Bay, and requested the ability to use more "aggressive tactics." In response, Defense Secretary Donald Rumsfeld approved a range of increasingly severe interrogation tactics.⁹⁵ There were three categories of escalating pressure. Under the first, detainees could be yelled at and deceived about their surroundings and their fates. Under the second category, detainees could be forced to stand for four hours at a time, held in isolation cells for up to thirty days, made to shave, made to strip naked, be deprived of light, and have stress induced by the use of dogs and other fearful things.⁹⁶ In the third category, Rumsfeld rejected certain measures (such as placing towels over detainees' faces so they could believe they were going to suffocate), and instead permitted "mild, noninjurious physical conduct."⁹⁷

The policy was rescinded after six weeks when questions were raised by military lawyers as to the legality of certain methods.⁹⁸ But Rumsfeld did not rule out the use of any of these methods absolutely; rather he provided that if intelligence officers wanted to step up techniques against individual detainees in the future, they should forward a request to him and it should include a thorough justification.⁹⁹ Whether any such requests were made or granted is unknown.

What is known is that these interrogation tactics approved for Guantanamo Bay were exported to Afghanistan and Iraq. Some attribute this exportation in large part to a visit to Abu Ghraib from a team led by Major General Geoffrey Miller in August 2003. Miller, then Commander of the Guantanamo Bay facility, went to Iraq largely to assess the interrogation procedures.¹⁰⁰ Rumsfeld, impatient with the poor quality of information coming out of Iraq, and not understanding why U.S. troops were not getting better information to forestall the insurgent bomb attacks, arranged to send

⁹⁵ Richard Serrano & Richard B. Schmitt, *Files Show Bush Team Torn Over POW Rules*, L.A. TIMES, June 23, 2004, at A1.

⁹⁶ *Id.* (Rumsfeld, in approving these categories added: "However, I stand for 8–10 hours a day. Why is standing limited to 4 hours?").

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Mazzetti et al., *supra* note 25, at 33. Janis Karpinski said that Miller was sent to "Gitmo-ize" [sic] Iraq. Scott Higham et al., *Prison Visits by General Reported in Hearing: Alleged Presence of Sanchez Cited by Lawyer*, WASH. POST, May 23, 2004, at A01.

Commander Miller to Iraq.¹⁰¹ One reporter described the charge to Miller this way: “Rumsfeld pointed out that Gitmo[’s use of increasingly aggressive tactics] was producing good intel. So he [sent] Miller to Iraq to improve what they were doing out there.”¹⁰²

It is clear that Miller recommended a new set of rules for Abu Ghraib based on those at Guantanamo Bay.¹⁰³ Even the official government report conceded that Abu Ghraib had been “Gitmoize[d].”¹⁰⁴ As the Final Report of the Independent Panel to Review Department of Defense Detention Operations concluded:

Interrogation techniques intended only for Guantanamo came to be used in Afghanistan and Iraq. Techniques employed at Guantanamo included the use of stress positions, isolation for up to 30 days and removal of clothing. In Afghanistan techniques included removal of clothing, isolating people for long periods of time, use of stress positions, exploiting fear of dogs, and sleep and light deprivation. Interrogators in Iraq, already familiar with some of these ideas, implemented them even prior to any policy guidance from [command].¹⁰⁵

In sum, what is the significance of the Pentagon’s graduated interrogation rules? Although the Pentagon’s new rules were rescinded, in many ways the rescission is irrelevant. First, the mere fact that Rumsfeld left the door open for the use of severe interrogation tactics by permission demonstrates that no absolute prohibition on inhumane tactics truly existed in

¹⁰¹ See HERSH, *supra* note 40, at 30.

¹⁰² Barry et al., *supra* note 84, at 33.

¹⁰³ Johanna McGeary, *Pointing Fingers: The Top Brass Says the Scandal at Abu Ghraib Can Be Blamed on a Few Bad Apples, but Did the Pentagon’s Zealous Pursuit of Intelligence Give a License for Abuse?*, TIME, May 24, 2004, at 44, 46. The Red Cross, provided with the list of approved practices, said that most methods would be banned under the Geneva Convention. *Id.*

¹⁰⁴ HERSH, *supra* note 40, at 31 (Miller’s concept was to “Gitmoize” the prison system in Iraq—to make it more focused on interrogation). In addition to bringing over Miller, Seymour Hersh contends that Rumsfeld brought SAPS (a special access program) to Iraq:

The solution endorsed by Rumsfeld . . . was to get tough with those Iraqi prisoners who were suspected of being insurgents . . . [He] expanded the scope of the SAP, bringing its unconventional methods to Abu Ghraib. The commandos were to operate in Iraq as they had in Afghanistan. The male prisoners could be treated roughly and exposed to sexual humiliation.

Id. at 59; see also *id.* at 46–47.

¹⁰⁵ PANEL REPORT, *supra* note 6, at 68.

the Administration.¹⁰⁶ While the Administration outwardly insisted that it was following the “law” on interrogation, that assurance is of small comfort given the Administration’s expansive view of what tactics were legal. Second, even though rescinded, the practices sanctioned in Guantanamo had already “migrated” to Abu Ghraib and Afghanistan, demonstrating the way in which a perceived need to gain information in one context contributed to an overall increased use of abusive interrogation methods elsewhere. An acceptance of “intense” interrogation tactics in one presumably narrow context becomes transformed into broader usage in other arenas.

d. *“Driving the Market for Torture Derived Information”*¹⁰⁷

The final evidence of moral ambiguity in the White House is the practice of contracting out for torture service. As one official described it, “we don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.”¹⁰⁸ Or, as Professor Turley puts it, “[W]e are now driving the new market for torture-derived information. We have gone from a nation that once condemned torture to one that contracts out for torture services.”¹⁰⁹

Since 9/11, according to numerous sources, several terrorist suspects have been quietly shipped to other countries.¹¹⁰ As one U.S. diplomat

¹⁰⁶ Some experts go further, and suggest that a truly independent investigation would find that at least some of the direct responsibility for Abu Ghraib rests at least with Donald Rumsfeld. See, e.g., Pearlstein, *supra* note 29, at 16 (stating that Rumsfeld directed at least one detainee be held secretly at Abu Ghraib, and approved interrogation techniques barred by international law); HERSH, *supra* note 40, at 362.

¹⁰⁷ Turley, *supra* note 6, at 17.

¹⁰⁸ *Id.* at 17.

¹⁰⁹ *Id.* See also Tim Harper, *U.S. Rights Centre Seeks Probe of Arar Case*, TORONTO STAR, Nov. 12, 2003, at A12. Certainly, rendition is not totally unique to the Bush Administration. The Clinton Administration used it after the bombings of the U.S. embassies in Kenya and Tanzania in 1998. “But it also pressed allied intelligence services to respect lawful boundaries in interrogations.” Priest & Gellman, *supra* note 6, at A14. The CIA, in testimony before Congress, acknowledged that before 9/11, it had engaged in about seventy renditions. The Bush Administration refuses to discuss renditions since 9/11. HERSH, *supra* note 40, at 55. Sending a person to a foreign country with knowledge that they will be tortured violates the Convention Against Torture.

The Administration had supported a proposed law that would make it even easier to render suspects. The proposal, tacked onto a much larger bill, would allow deportation of an individual even if certain he would be tortured. Michael Hirsh, *To Torture or Not?*, NEWSWEEK, Oct. 5, 2004, available at 2004 WLNR 14137017.

¹¹⁰ After 9/11, “the United States has sent prisoners to Pakistan, Saudi Arabia, Egypt, Morocco, and Uzbekistan, as well as other countries with documented histories of torturing suspects.” Andrew A. Moher, Note, *The Lesser of Two Evils—An Argument for*

admitted, "After September 11, these sorts of movements have been occurring all the time It allows us to get information from terrorists in a way we can't do on U.S. soil."¹¹¹ Examples include Muhammad Saad Iqbal Madni, a Pakistani, who was flown aboard a Gulfstream to Egypt, and Mohammad Haydaf Zammar, a Syrian-born German whom the CIA allegedly arranged to be sent to Syria.¹¹² Additionally, American operatives seized two Egyptians who were seeking asylum in Sweden but who were believed by the United States to be militant Islamists, and flew them to Cairo, where they "underwent extensive, and brutal, interrogations."¹¹³ Eventually, one of the two men was determined to have few ties to terrorism and was released. The other, who admitted to being a member of Islamic Jihad, but claimed that he had denounced the use of violence, was sentenced to twenty-five years in an Egyptian prison.¹¹⁴

As with the use of torture in U.S. facilities, the Bush Administration maintains an outward strategy of denial; that is, it denies that torture is the intended result of its rendition policy. According to the Administration, American officials merely assist the transfer of suspects who are wanted on criminal charges by friendly countries. But again, the reality is somewhat different. As the *Washington Post* reported, "[F]ive officials acknowledged, as one of them put it, 'that sometimes a friendly country can be invited to "want" someone we grab.' Then, other officials said, the foreign government will charge him with a crime of some sort."¹¹⁵ At least one official honestly stated that he knew the person rendered would likely be tortured: "'I do it with my eyes open', he said."¹¹⁶

Judicially Sanctioned Torture in a Post 9/11 World, 26 T. JEFFERSON L. REV. 469, 480 (2004). By 2004, the United States was running a covert chartered airline moving CIA prisoners from one secret facility to another. Barry et al., *supra* note 84, at 32. For an overall comprehensive discussion of rendition, see Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to "Extraordinary Renditions,"* 60 THE RECORD 13 (2005); Jane Mayer, *Outsourcing Torture: The Secret History of America's Extraordinary Rendition Program*, THE NEW YORKER, Feb. 14, 2005, at 106.

¹¹¹ Rajiv Chandrasekaran & Peter Finn, *U.S. Behind Secret Transfer of Terror Suspects*, WASH. POST, Mar. 11, 2002, at A01.

¹¹² Faye Bowers & Philip Smucker, *US Ships al Qaeda Suspects to Arab States*, CHRISTIAN SCIENCE MONITOR, July 26, 2002, at 1; see also David E. Kaplan et al., *Playing Offense*, U.S. NEWS & WORLD REPORT, June 2, 2003, at 18 ("The CIA has helped move dozens of detainees not only to Jordan but also to Egypt, Morocco, and even Syria.").

¹¹³ HERSH, *supra* note 40, at 53. For example, the two were reportedly subject to repeated torture by electrical shock. *Id.* at 54.

¹¹⁴ *Id.*

¹¹⁵ Priest & Gellman, *supra* note 6.

¹¹⁶ *Id.*

Once again, the Administration is caught in what can be described most charitably as moral ambiguity: denying legal complicity, yet in reality “knowing” and even intending torture to occur if necessary. Here, it is more of a “don’t see, don’t know” policy. “If we’re not there in the room, who is to say?,” one Bush administration official explained.¹¹⁷ Thus, the U.S. policy of rendition contributes to an atmosphere of acceptance of torture. So long as it occurs “under the radar,” the U.S. implicitly encourages information derived from abusive practices.

3. Conclusion

My point in these sections is simple: the Bush administration in a variety of ways conveyed at least an implicit approval of the use of interrogation tactics that at their worst crossed the line into torture, and at best constituted cruel and inhumane treatment. Singly or in combination, the Administration’s refusal to acknowledge abusive practices for years, its production of memoranda consistently embracing a possible use of torture, its approval of severe tactics in Guantanamo, its failure to cabin those tactics to that location, and its practice of rendering terrorist suspects to other countries for aggressive questioning all conveyed a coherent message that was not lost on anyone: do what you need to get the information necessary to win the war on terror and the war in Iraq, and pay no heed to domestic or international law.¹¹⁸ As Pulitzer Prize winning journalist Seymour Hersh wrote, “The roots of the Abu Ghraib scandal lie not in the criminal inclinations of a few Army reservists, but in the reliance of George Bush and Donald Rumsfeld on secret operations and the use of coercion—and eye-for-eye retribution—in fighting terrorism.”¹¹⁹

B. Lesson Two: Torture Cannot be Cabined

A critical lesson of Abu Ghraib is that torture must be absolutely and unconditionally condemned; condemning its use in all but certain narrow circumstances is doomed to failure. Virtually no one after September 11 advocated the wholesale use of torture. Rather, the argument was most often posited as an option in the “ticking bomb” scenario. That is, torture would be permitted if significant loss of life were imminent, and the only way to obtain

¹¹⁷ *Id.*

¹¹⁸ See Dorning, *supra* note 10, at 9 (“[W]hen public statements, policy decisions and internal documents are examined in total, there is strong suggestion of an atmosphere set at the highest level of government that contributed to the mistreatment of detainees, critics of the Bush Administration,” like Kurt Goering, deputy executive Director of Amnesty International, USA claim).

¹¹⁹ HERSH, *supra* note at 40, at 46.

the necessary information to prevent such a tragedy would be through the use of extreme interrogation methods.¹²⁰

I have discussed elsewhere several problems with creating an exception to an absolute prohibition on torture if there is a “ticking bomb.”¹²¹ One of the arguments I, and others, make is that “no matter how one tries to confine the use of torture to extreme, narrow circumstances, the temptation to broaden those circumstances is inevitable.”¹²² The story of Abu Ghraib provides empirical support for this proposition.

Nowhere was the contemplation of torture of high-level al Qaeda detainees in Gitmo or elsewhere ever intended to be utilized more generally, and especially not on persons like those abused in the Iraqi prison.¹²³ Clearly, the Bush Administration’s contemplation of torture at its worst anticipated its usage on hard-core al Qaeda personnel who likely had information on

¹²⁰ Strauss, *supra* note 1, at 205.

¹²¹ There are numerous problems in defining the “ticking bomb” scenario. First, there is an issue of certainty. How certain should we be that there is a bomb and that the suspected terrorist knows its location? Do we need to have reasonable suspicion, probable cause, or evidence beyond a reasonable doubt before torture will be used? Moreover, how many lives must be in danger before the “ticking bomb” scenario will come into play? Is one life in danger enough to justify the use of torture? What about ten lives? Lastly, there are problems with assessing the level of exigency. Must the bomb literally be ticking? What if the information pertains to a plot to detonate a bomb within a week? A month? At what point do we draw the line to determine whether traditional methods of law enforcement will uncover the plot? How much assurance must we have that alternative interrogation tactics won’t work, or that torture will? *See id.* at 265–68.

¹²² Strauss, *supra* note 1, at 267. *See also* James Glanz, *Torture is Often a Temptation and Almost Never Works*, N.Y. TIMES, May 9, 2004, at 5 (quoting the head of an Israeli human rights organization, discussing Israel’s experience with the “ticking bomb” exception); Michael Traynor, Dissenting Statement, *Highly Coercive Interrogations*, Nov. 16, 2004, available at http://bcsia.ksg.harvard.edu/BCSIA_content/documents/Traynor_Letter.pdf (“The so-called ‘ticking bomb’ scenario involving interrogation of a captured terrorist is a difficult theoretical one. In the real world, the scenario posed is both artificial and unlikely—a straw man, invented to create fear and a panicked public endorsement of the shameful erosion of due process. More likely, large numbers of captured people will be swept up by troops. Such people will include individuals who are innocent and have no useful information . . .”).

¹²³ No attempt was made to differentiate who might be high intelligence interest prisoners. Many, if not most, of the detainees in Iraq were suspected of crimes unconnected to security or to the U.S. war effort. *See* Lisa Hajjar, *Torture and the Politics of Denial*, IN THESE TIMES, June 21, 2004, at 12. Indeed, some suggest that most of the detainees were innocent of any crime. *See* Traynor, *supra* note 122.

impending attacks. But the kind of abuse dealt out at the Iraqi prison was worlds away from any “contemplated” use of torture.¹²⁴

How did this happen? Well, in part, the argument is tied to my first lesson: the acceptance of torture in even limited, narrow, theoretical instances creates an atmosphere that tolerates torture generally, and thus inevitably, torture will occur. Although the Administration initially set out to limit aggressive questioning, such limits inevitably fail. As one journalist noted:

[w]hat started as a carefully thought-out, if aggressive, policy of interrogation in a covert war—designed mainly for use by a handful of CIA professionals—evolved into ever-more ungoverned tactics that ended up in the hands of untrained MPs . . . Originally, Geneva Conventions protections were stripped only from Qaeda and Taliban prisoners. But later, Rumsfeld himself, impressed by the success of techniques used against Qaeda suspects at Guantanamo Bay, seemingly set in motion a process that led to their use in Iraq, even though that war was supposed to have been governed by the Geneva Conventions. Ultimately, reservist MPs, like those at Abu Ghraib, were drawn into a system in which fear and humiliation were used to break prisoners’ resistance to interrogation.¹²⁵

And, in part, the argument is separate and unique. Cabining torture to narrow circumstances cannot work because it is impossible, especially in the heat of battle, to separate out the “ticking bomb” cases. The abuses in Afghanistan, Gitmo, and Abu Ghraib were not undertaken primarily for sadistic reasons.¹²⁶ In Iraq and Afghanistan, I have no doubt that many of the soldiers felt an urgency to obtain information. In light of the ever increasing dangers from insurgency, the easy “softening” of the prisoners could provide valuable clues to the “good guys.”¹²⁷ And in Gitmo, the constant reiteration

¹²⁴ See Parry, *supra* note 56, at 237 (noting that things spun out of control when the Bybee Memo, designed for CIA interrogation of a few high-level terrorists, was adopted by the Pentagon in 2003 and used to justify coercive interrogation in Guantanamo and later in Iraq).

¹²⁵ Barry et al., *supra* note 84, at 29.

¹²⁶ Rather than sadism, studies more likely demonstrate that people act this way in response to authoritarian approval. In wartime, most abuse is not due to personality or sadistic tendencies, but to group dynamics and other circumstances. If a command figure does not put a stop to it, abuse can often spread “like a psychological epidemic,” according to Israeli psychiatrist Dr. Ilan Kutz. Without clear rules, abuse is virtually guaranteed. Claudia Wallis, *Why Did They Do It?: Are Those Charged with Abuse a Few Bad Apples, or Are They Just Like the Rest of Us?*, TIME, May 17, 2004, at 38, 42. It is alarmingly easy for people to engage in torture if they feel that the behavior has been sanctioned by an authority figure. *Id.*

¹²⁷ PANEL REPORT, *supra* note 6, at 63–66. “With the active insurgency in Iraq, pressure was placed on the interrogators to produce ‘actionable’ intelligence With

by the Administration that another terrorist attack was imminent, and that information was the only way to stop such an attack, provided the impetus to pressure the detainees.

Of course, in none of these situations is there the quintessential “ticking bomb.” Yet, to the soldiers in the field, the urgency likely seemed no less real. As one military official stated in justifying the sexual humiliation: “[T]he typical Arab male will do anything to avoid [sexual humiliation] The overall process is one of humiliating these people. And that is being used to find the people who are planting roadside bombs.”¹²⁸ There was absolutely no evidence that the people chosen for abuse had any information about the roadside bombs, much less that the bombings were imminent, or that the information was otherwise undiscoverable. Not even the most avid defender of torture in the “ticking bomb” scenario would claim that such a justification for torture was truly met in this situation. Yet, to the soldiers, the abstract threat likely seemed all too real and imminent.

The point is that once torture is countenanced in one setting, it inevitably is utilized in others. Abu Ghraib provides factual, real life support for the slippery slope argument. Maintaining the option to torture in certain “limited narrow circumstances,” such as a “ticking bomb” scenario will always open the door to torture in situations where no arguable moral necessity is present. As Kenneth Roth, the head of Human Rights Watch noted, “Proponents of torture always cite the ‘ticking bomb’ scenario. The problem is that the situation is infinitely elastic. You start by applying it to a terrorist suspect, and soon you’re applying it to his next-door neighbor who perhaps might know something.”¹²⁹ That is precisely what happened in Abu Ghraib. Any possible claims of necessity in the use of aggressive techniques against al Qaeda operatives at Guantanamo Bay were lost by the time the same tactics were applied to Iraq.

C. Lesson Three: Torture is (Mostly) Ineffective

To some extent, the ineffectiveness of torture in obtaining reliable information is not a new discovery. Most interrogation experts acknowledge that torture is generally a poor way to obtain valuable and truthful

lives at stake, senior leaders expressed, forcibly at times, their needs for better intelligence.” *Id.* at 65.

¹²⁸ Amanda Ripley, *The Rules of Interrogation: It’s a Murky Business, but Some Methods Work Better Than Others*, TIME, May 17, 2004, at 44, 46.

¹²⁹ *Id.* Cf. Gillers, *supra* note 79, at 1. Although the January 9, 2002 memo on the treatment of prisoners in Afghanistan was intended only for the treatment of al Qaeda members and Taliban militias, “some degree of misidentification was of course inevitable.” *Id.* Significant mistreatment of Afghans with no apparent connection to ongoing hostilities has been discovered. *Id.*

information.¹³⁰ Why? Some who are tortured have no valuable information to give. Some who are tortured know important information but would “give it up” even without torture. Some who are tortured know critical information but would not provide it even under torture. And some who have valuable information would reveal it more readily if subjected to non-abusive interrogation tactics than abusive ones.

Torture does not work in part because those tortured may indeed have no worthy information to convey. As the events of September 11 indicate, terrorists often compartmentalize a plan so that any one person knows only what is necessary for him to know. As Professor van der Vyver writes: “Terrorists are not in the habit of revealing their evil intent and plan of action before the event—not even widely within their own ranks.”¹³¹ Moreover, in the unlikely circumstance that a detainee is privy to the entire plans for a major imminent attack, those in charge would almost assuredly alter the operation.¹³²

Additionally, even if an individual knows valuable information, “[e]xperts say that physical and/or psychological abuse may harden, rather than weaken, a prisoner’s resistance to his captors. Minds clouded by pain or drugs, or addled by sleep deprivations may have trouble recalling important details.”¹³³ Moreover, torture may not work because a “person under extreme physical duress may say almost anything just to stop the agony,”¹³⁴ but may not necessarily tell the truth. As Psychology Professor Dr. Robert Jay Lifton, who studied torture victims in China, noted, under severe treatment, people said what they believed their interrogators wanted to hear: “They come up with so-called wild confessions.”¹³⁵ Alternatively, a terrorist who is a true

¹³⁰ Strauss, *supra* note 1, at 261–62 (“Even the CIA has come to the conclusion that physical abuse usually is ineffective in ferreting out the truth.”). See also Glanz, *supra* note 122, at 5 (citing studies by numerous experts on the ineffectiveness of torture); William F. Schulz, *The Torturer’s Apprentice*, THE NATION, May 13, 2002, at 26 (torture is “notoriously unreliable”).

¹³¹ Johan D. van der Vyver, *Torture as a Crime Under International Law*, 67 ALB. L. REV. 427, 457 (2003). See also Strauss, *supra* note 1, at 262 (discussing the fact that most of the nineteen hijackers did not know the details of the plan to hijack and pilot planes into the World Trade Center on September 11, 2001).

¹³² Strauss, *supra* note 1, at 262.

¹³³ Reed Johnson, *The Art of Interrogation*, L.A. TIMES, Mar. 15, 2003, at E1. See also the following comments by Magnus Ranstorp, Deputy Director of the Center for the Study of Terrorism and Political Violence at St. Andrews University in Scotland: “Pain alone will often make people numb and unresponsive.” Don Van Natta, Jr., *Threats and Responses: Interrogations*, N.Y. TIMES, Mar. 9, 2003, at A1.

¹³⁴ Johnson, *supra* note 133, at E1.

¹³⁵ Ripley, *supra* note 128, at 46. See also Daniel Nguyen, *Victims, Ex-Interrogators Denounce Torture*, DENV. POST, July 9, 2004, at A16 (noting that torture does not work,

zealot possibly will find his will to resist reinforced by the interrogation tactics that confirm his view that the United States is the devil.¹³⁶

Indeed, most professional interrogators know that instead of torturing, sophisticated psychological strategies and inducements are often more effective. In other words, torture may actually be counterproductive: had inducements and befriending been employed instead of abuse, more accurate and more valuable information may have been produced than had torture been utilized.¹³⁷

Indeed, the main example of where torture is purported to have “worked” really demonstrates its ineffectiveness.¹³⁸ Many point to the Philippines “cracking” of Abdul Hakeim Murad as a “success” for torture.¹³⁹ In 1995, the police in the Philippines tortured Murad after finding substantial bomb making equipment in his apartment. They burned him with cigarettes (including on his testicles), forced water down his throat, and broke his ribs.¹⁴⁰ Murad kept silent for weeks. Finally, when the Philippine authorities threatened to turn him over to the Israelis, Murad broke, and confessed to a terror plot to blow up eleven airliners and to assassinate the Pope.¹⁴¹ But the fact that Murad withstood torturous interrogation tactics for months before revealing information (presumably true)¹⁴² shows that torture may not even work in the one instance it is most often touted: the “ticking bomb” scenario where presumably months are not available.¹⁴³

but kindness and aligning with the prisoner does work); Peter Maas, *The World: Torture, Tough or Lite; If a Terror Suspect Won't Talk, Should He be Made To?*, N.Y. TIMES, Mar. 9, 2003, at D4 (“A suspect who wants to avoid the unkindness of having his teeth extracted with a set of dirty pliers may say whatever he thinks his torturers want to hear.”).

¹³⁶ Traynor, *supra* note 122, at 2.

¹³⁷ See, e.g., Johnson, *supra* note 133.

¹³⁸ Strauss, *supra* note 1, at 261–62. But see PANEL REPORT, *supra* note 6, at 8 (suggesting that “stronger interrogation techniques [were used on two detainees] gaining important and time-urgent information.” No further evidence or discussion was provided.).

¹³⁹ See Strauss, *supra* note 1, at 263 n.212.

¹⁴⁰ Michael Slackman, *What's Wrong with Torturing al Qaeda Higher-Up?*, N.Y. TIMES, May 16, 2004, at D4.

¹⁴¹ *Id.* See also Jack Wheeler, *Interrogating KSM: How to Make the al Qaeda Terrorist Sing in an Hour*, WASH. TIMES, Mar. 5, 2003, at A19.

¹⁴² Ironically, “the veracity of Murad’s confessions has recently come into dispute.” Moher, *supra* note 110, at 481.

¹⁴³ Slackman, *supra* note 140, at 4; see also Maas, *supra* note 135 (“[I]n its apparent success, Mr. Murad’s interrogation shows torture’s limitations. Mr. Murad may have nearly died, but he didn’t crack until a new team of interrogators told him falsely that they were from the Mossad and would be taking him to Israel.”).

The torture employed in Abu Ghraib appears to demonstrate the total failure of the tactic for information-gathering purposes. I say "appear" because we really do not know if any intelligence was obtained as a result of the practices there. Certainly, there were no assertions of any valuable information being obtained as a result of the horrific abuses heaped on the detainees. Indeed, there is no evidence that the particular person "tortured" or abused had any worthy information to obtain.¹⁴⁴ And certainly, there is no proof that valuable information was obtained that could not have been procured through other methods.

No one can truly argue, however, that there is *no* possibility, even theoretical, for torture to *ever* produce reliable and possibly life-saving information. My point rather is this: torture is usually ineffective, and Abu Ghraib demonstrates this aptly.¹⁴⁵ It is particularly likely to be ineffective when dealing with hard-core terrorists involved in a major, large-scale attack—the quintessential "ticking bomb" scenario—where information is often compartmentalized, and one individual may not have all the clues regarding the anticipated event. Even if torture works in some circumstances, it may take so much time that it is unhelpful when time is absolutely of the essence.

Given such a remote chance for success from the use of torture, any harm from the use of such a practice becomes critical to consider. And these harms are inherent in *all* acts of torture; they occur *every* time torture is practiced, and whether the torture produces truthful information or desperate, false confessions. In other words, the bottom line is this: torture often is ineffective because the victim may have no information to provide. Even if the victim of torture has valuable information, the person may give it up more readily without torture, or may not provide it at all when subjected to torture. Thus, only in rare and uncertain circumstances will torture "work." Weighed against these "benefits" of torture are the harms of abusive interrogation: it is not only morally wrong, but it is also instrumentally harmful to torture for the uncertain possibility that the horrific practice will yield valuable information. Torture works only rarely, but harms always. These harms are considered in the subsequent section.

D. Lesson Four: The Use of Torture is Harmful to the United States

I have argued elsewhere that torture is intrinsically evil and harmful for both the torturer and the tortured:

¹⁴⁴ See Hersh, *supra* note 40, at 54.

¹⁴⁵ Evidence shows that the torture undertaken at Guantanamo and Abu Ghraib was largely ineffective in obtaining valuable information. Sullivan, *supra* note 4, at 15–16.

Torture is evil not only because of what it does to those tortured, but also because of the great cost it imposes on the torturer and society itself. The interrogator is corrupted; he learns to treat suspects as objects, as subhuman. Society suffers as well. 'When the state itself beats and extorts, it can no longer be said to rest on foundations of morality and justice; but rather on force. When a state [employs] torture, it reduces the moral distance between a government act and a criminal act.'¹⁴⁶

As one international law expert noted, "Torture is one of the most disturbing crimes imaginable . . . International human rights law defines torture as one of the worst crimes it is possible to commit and there exists a universal prohibition in its practice under all circumstances."¹⁴⁷

Abu Ghraib teaches us that the harms of torture are not simply theoretical musings about moral debasement. The concrete harms that the United States suffered internationally from the abuses at the Iraqi prison and elsewhere cannot be understated.

First, the abuse undermined the legitimacy of our war effort in Iraq.¹⁴⁸ After the U.S. troops failed to uncover weapons of mass destruction, President Bush increasingly asserted the liberation of the country from Saddam's torturous rule as a justification for war. Given that our soldiers picked up where Saddam left off, that argument lacks persuasiveness on the streets of Baghdad.

Of course, the precise effect of the scandal and loss of legitimacy is not readily calculable—did we lose any coalition partners or future possible support precisely because of the abuse? How much did this boost the ranks of the insurgents?¹⁴⁹ To what extent did it encourage even more barbaric action on the part of those insurgents and other Islamic extremists?¹⁵⁰ While not

¹⁴⁶ Strauss, *supra* note 1, at 254. See also EDWARD PETERS, TORTURE 179–80, 187 (1985) (discussing the horror of torture).

¹⁴⁷ Daniel Rothenberg, "What We Have Seen Has Been Terrible" *Public Presentational Torture and the Communicative Logic of State Terror*, 67 ALB. L. REV. 465, 465 (2003).

¹⁴⁸ See Noah Feldman, *Ugly American*, THE NEW REPUBLIC, May 30, 2005, at 23 ("Abu Ghraib . . . constituted the greatest single blow thus far to the American policy of democratization in the Middle East."). Secretary Rumsfeld, "with characteristic understatement—said that the Abu Ghraib scandal has been 'unhelpful' to the U.S. effort in Iraq." Mark Mazzetti et al., *Inside the Iraq Prison Scandal*, U.S. NEWS & WORLD REPORT, May 24, 2004, at 28.

¹⁴⁹ "In Abu Ghraib, according to the official documents, up to 90 percent of the inmates were victims of random and crude nighttime sweeps. If these thousands of Iraqis did not sympathize with the insurgency before they came into American custody, they had good reason to thereafter." Sullivan, *supra* note 4.

¹⁵⁰ Those who beheaded Nicholas Berg claimed that it was in response to the abuse, and claimed moral authority based on what was done to their Muslim brothers. Mazzetti

capable of precise calibration, no one doubts that the impact is real. The United States' ability to claim moral authority for its war in Iraq seems more and more unrealistic. After Abu Ghraib, "the promises of the American-led occupiers to bring democracy to Iraq sounded more hollow than ever to increasingly cynical Iraqis."¹⁵¹

Moreover, the scandal harmed—perhaps irreparably—our foreign policy objectives, particularly in the Middle East and the Arab and Muslim world. There are predictions, including one by Karl Rove, a top Bush advisor, "that it will take a generation to repair the damage to America's image in the Middle East."¹⁵² Relatedly, it undoubtedly set back our war on terrorism, which relies so heavily on support in that region. As Wendy Patten of Human Rights Watch lamented, "After 9/11, the government said we couldn't win the war on terror unless [we used aggressive questioning tactics] Now we may be losing the war on terror because of these policies."¹⁵³ Abu Ghraib at the very least provided valuable propaganda for international terrorists. Stuart Taylor predicted that using torture might well cost more American lives than it would save by feeding the image of those who see Americans as sadistic, anti-Muslim imperialists.¹⁵⁴ Many terrorism experts believe that torture transforms enemies into terrorists.¹⁵⁵ As one put it, "Pain and

et al., *supra* note 148, at 20–22. Of course, this must be taken with a grain of salt—Islamic extremists practiced beheading before Abu Ghraib, and do not need our moral transgressions as an excuse for their horrific behavior.

¹⁵¹ Kevin Whitelaw et al., *Shocking and Awful*, U.S. NEWS & WORLD REPORT, May 17, 2004, at 26.

¹⁵² Bowden, *supra* note 52, at 37. *See also*, Esther Schrader & Patrick J. McDonnell, *Bush Denounces Troops Treatment of Prisoners*, L.A. TIMES, May 1, 2004, at A1 (noting the concern on the Hill that Muslims would see this as reflective of the manner in which Americans treat Muslims).

¹⁵³ McGeary, *supra* note 103, at 44. One subtle effect on the war on terror is the possible loss of the ability to convict suspected terrorists. Magnus Ranstorp, Director of the Center for the Study of Terrorism and Political Violence at the University of St. Andrews in Scotland, said that a common defense strategy will be to raise doubt about how the information on the suspect was obtained. "Dick Leurdijk, an expert on terrorism . . . said the reaction in Europe [to Abu Ghraib] had been strong enough that evidence from U.S.-interrogated prisoners would have a tough time being accepted by any court." Matthew Schofield, *U.S. Interrogations of Suspected Terrorists Will Be on Trial*, KNIGHT RIDDER TRIB. NEWS SERVICE, Aug. 8, 2004.

¹⁵⁴ Taylor, *supra* note 73, at 68. *See also* Nguyen, *supra* note 135 (torture causes long-lasting hatred towards the torturer); Mazzetti et al., *supra* note 148, at 120–21 (five hooded men declared that the abuses in Abu Ghraib will be redeemed by blood, and moments later, cut off the head of twenty-six-year-old Pennsylvanian Nicholas Berg).

¹⁵⁵ Owen Bowcott, *Torture Trail to September 11*, THE GUARDIAN, June 24, 2003, at 19 (quoting Dr. Suzan Fayad, a psychiatrist who works with an Egyptian organization to rehabilitate victims of violence); *see also* Hertzberg, *supra* note 36, at 29 (over time,

humiliation will turn some innocent suspects into real terrorists, and turn real terrorists into more-determined monsters.”¹⁵⁶

On a more basic level, the behavior at Abu Ghraib and elsewhere jeopardized our war against terror. Ironically, the Bush Administration’s approach to fighting terrorism, and its complicity in torture could be used by some to justify terrorism. Terrorism, too, is based on the claim that the ends justify the means. Terrorists inflict pain and suffering upon innocent people in order to achieve some ultimate end that, in the minds of the terrorists, justify the means. Morally and rhetorically, the torture at Abu Ghraib makes it harder to condemn terrorism and, in a perverse way, legitimizes the terrorist’s abhorrent logic. As Professor Kermnitzer eloquently argues:

The license to employ physical pressure in interrogation constitutes a victory for terror, which has succeeded in causing the State to stoop to quasi-terrorist methods. The belief that the ends justifies the means, the willingness to harm fundamental human values . . . in order to attain a goal . . . these are salient characteristics of terrorism.¹⁵⁷

Third, the ability of the United States to maintain a standard of morality and decency and to insist on others adhering to such a standard took a devastating blow. While not likely a knock-out punch, such a blow will likely cause real problems. As Republican Senator John McCain lamented in response to Abu Ghraib, and, more specifically, to the memos justifying torture: “It’s just incredible . . . Why doesn’t every nation in the world now have a green light to do everything it thinks is necessary to combat a ‘terrorist threat?’”¹⁵⁸ American soldiers captured during wartime now may not receive the protections of the Geneva Convention or the Convention Against Torture.

In sum, the point I am making is simply this: even if torture *occasionally* succeeds in the short term, the long term harms that *always* occur almost certainly outweigh it. As one author writes:

Does torture work in fighting terrorism? In the short term, it obviously can . . . Israeli security officials say they have prevented many terrorist

torture probably ends up adding to terrorists: “Egyptian tortures made [Ayman al-Zawahiri] one of the deadliest terrorists on earth.”).

¹⁵⁶ Maas, *supra* note 135.

¹⁵⁷ Mordechai Kremnitzer, *The Landau Commission Report—Was the Security Service Subordinated to the Law, or the Law to the “Needs” of the Security Service?*, 23 ISR. L. REV. 216, 263 (1989).

¹⁵⁸ Ripley, *supra* note 38, at 49, 50. See also Marc Sandalow, *American Treatment of Prisoners Assailed*, SAN FRAN. CHRON., May 26, 2005, at A1 (“Amnesty International [says] the United States’ treatment of prisoners at Guantanamo Bay and Abu Ghraib had emboldened abusive regimes and weakened human rights around the world.”).

attacks with information gleaned from coercive interrogations. The French authorities claim to have won the battle of Algiers, and the Argentinian junta defeated its leftist opponents. But these victories have come at a cost, and have limits. Harsh Israeli interrogations have not stopped the suicide bombings, and have left many Palestinians embittered. France's brutal methods in Algeria divided the French themselves, and led a few years later to the granting of Algerian independence. Argentina's military dictators were toppled by popular resentment, and the country is still struggling to come to terms with the legacy of their anti-terrorism campaign.¹⁵⁹

E. Lesson Five: The Future Debate About Torture Must Consider the Definition of Torture

Developing a precise, all-encompassing definition of torture lies outside the scope of this Article. Rather, my point here is twofold. First, one lesson of Abu Ghraib is that some further dialogue or debate about the definition of torture must occur.¹⁶⁰ Second, the United States should not only explicitly repudiate the Bybee Memo, it should agree to adhere to the broadest definition of torture accepted by the world community.

1. A Dialogue on Definition

The difficulties with defining torture transcend the Bush Administration. There is no clear, all-encompassing definition of torture or inhumane treatment. Treaties and laws necessarily define the prohibited conduct somewhat vaguely and the few court cases that have addressed this issue tend to avoid any overarching definition, opting instead for a consideration of specific tactics. For example, the Convention Against Torture simply provides:

[T]he term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession . . . It

¹⁵⁹ *Ends, Means and Barbarity*, *supra* note 6, at 3.

¹⁶⁰ Such a dialogue appears to have begun. *See, e.g.,* Sonni Efron, *Torture Becomes a Matter of Definition*, L.A. TIMES, Jan. 23, 2005, at A1 (the full Senate likely will debate the definition of torture). A good start for thinking about a definition of torture was provided by Professor Jeremy Waldron. I commend his piece despite the fact that he misidentified my workplace and clearly misconstrued a piece of sarcasm and levity in my article for serious commentary. *See* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House* 16–24 (2004), available at <http://www.columbia.edu/cu/law/fed-soc/otherfiles/waldron.pdf>; *see also* Linda Keller, *Is Truth Serum Torture?*, 20 AM. INT'L L. REV. 521 (2005) (discussing the definition of torture with reference to truth serum).

does not include pain or suffering arising only from, inherent to, or incidental to lawful sanctions.¹⁶¹

The Convention also exhorts its signatories to avoid inhumane or degrading treatment that does not amount to torture, but does not define the line between torture and other abuses.

No more specific definition of torture has ever been adopted by the world community. In those few cases dealing with the definition of torture, most courts have avoided providing an overall definition, preferring to single out certain prohibited practices as torture or inhumane treatment. For example, the European Court of Human Rights in *Ireland v. United Kingdom* found that the British practices of wall-standing for hours, hooding, loud noise, sleep deprivation, and restricted food and water were inhumane and degrading but not torture because of the "intensity of the suffering."¹⁶² Similarly, the Supreme Court of Israel prohibited numerous interrogation practices including shaking, waiting in the "shabach" position, or frog crouch, excessive tightening of handcuffs, and intentional sleep deprivation.¹⁶³

As previously discussed, the Bush Administration appeared to adopt its own definition of torture in the Bybee Memo which asserted that to be torture, physical abuse must cause severe pain difficult to endure and equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. Mental pain and suffering constitutes torture only if it results in "significant psychological harm of significant duration, e.g., lasting for months or even years."¹⁶⁴

This memo suggested that there lies a "range" of "severe" pain that does not constitute torture. Yet the Convention does not draw such a distinction, and for good reasons. First, it is not at all clear why "severe" pain by itself does not suffice to constitute torture, even if it does not rise to the level of organ failure. And, of course, the obvious question arises: what pain constitutes such a level? It is difficult enough to distinguish between severe

¹⁶¹ See Convention Against Torture, *supra* note 67, art. 1, pt. 1.

¹⁶² *Ireland v. United Kingdom*, 2 E.H.R.R. 25, ¶167 (1978).

¹⁶³ Public Comm. Against Torture in *Israel v. The State of Israel*, H.C.J. 5100/94 (1999). When questioned recently, the Bush Administration has refused to condemn or discuss specific practices. For example, Condoleezza Rice, during her confirmation hearings for Secretary of State, refused to say whether water-boarding, a practice in which the victim is made to believe that he is drowning, is torture. Efron, *supra* note 160.

¹⁶⁴ Bybee Memo, *supra* note 67, at 1. As indicated, the Administration did retreat from this position at the end of 2004. See *supra* note 85. It is worth reiterating, however, that the authors of the repudiated memos have been promoted. Alberto Gonzales became U.S. Attorney General in 2005; Jay Bybee was rewarded with a position on the Ninth Circuit Court of Appeals.

and non-severe pain; to draw a clear line between severe pain and even more severe pain seems impossible. What exactly does it feel like to suffer organ failure, and how does this pain differ from otherwise “severe” pain short of organ failure? How would an interrogator assess the level of pain likely to accrue so as to distinguish between torture and non-torture? Is the assessment objective? Subjective?

Or, more concretely, would electric shock to the genitals cause pain akin to that experienced in organ failure? And how does one begin to make such an assessment? Human studies? Questionnaires of victims? My point here is that such a definition renders the prohibition against torture meaningless: every nation could assert that the pain, though severe, was not severe enough—and who could contradict such an assertion? As one commentator noted with disbelief, “under the Bybee Memo, sliding needles under fingernails or holding someone’s head under water to the point of drowning would not count as torture.”¹⁶⁵

Concededly, some of the same criticism could be lodged against the “severe” pain threshold currently contained in the treaties and laws. But, any definitional difficulties seem multiplied beyond comprehension by the “refinement” on severity of pain imposed by the Bybee Memo. Not surprisingly, this attempt by the Administration via the Bybee Memo to parse out a realm of severe pain that is acceptable to inflict on an individual has received virtually universal condemnation from the legal community. As the President of the National Institute of Military Justice remarked about the swell of voices calling the memo “preposterous”: “I can’t remember a more unanimous chorus of lawyers from every part of the political spectrum agreeing on an issue.”¹⁶⁶ And, of course, as previously mentioned, the Bush Administration backed off this definition at the end of 2004.¹⁶⁷

My point here, however, goes beyond criticism of the Bybee Memo’s attempt to define torture. Rather it is a more basic one: the Bybee Memo was only possible because the definition of torture provided in treaties and laws is concededly somewhat vague and open-ended. While there is likely a core area of practices most would agree constitutes torture, there are certainly significant grey areas. And these grey areas will likely be exploited in the war on terror when the need for information is so pressing. Thus, one result of the Abu Ghraib scandal should be a dialogue on the definition of torture. Is there a way to define torture more succinctly so that clearer guidelines are provided? For example, would a list of prohibited practices be more useful than the prohibition on practices causing “severe” pain? Of course, man’s creativity knows no bounds, and novel means of cruelty would likely thwart

¹⁶⁵ *Shameful Revelations*, *supra* note 65.

¹⁶⁶ Sterngold, *supra* note 74.

¹⁶⁷ See *supra* note 85.

such a list. A dialogue may well conclude that no more specific definition is possible, but even such a conclusion may be useful in exploring the boundaries of prohibited behavior.

2. The Administration Must Define Torture Broadly in Light of Abu Ghraib

The Administration's response to the abuses of Abu Ghraib was a consistent denunciation of the use of torture and a persistent reassurance that the United States will follow the law and will not torture. Yet such assurances mean little if the Bush Administration continues to insist on the right to define torture in a way that no one else countenances. Those assurances are further undermined as the Administration persists in a belief that the law allows the President to lawfully order torture in the name of national security, or when done for informational purposes.

Thus, my point here is simple: the Administration's attempt to define torture narrowly in the Bybee Memo exacerbated the outrage over the abuses at Abu Ghraib and weakened the credibility of the United States to denounce the use of torture in the future. Thus, the United States needs to take an approach that steers clear of any behavior that might constitute torture and that convinces the public and the world that the United States is truly committed to humane treatment principles. Until the day when there is universal agreement on the definition of torture (if such a day ever occurs), the United States should announce that it is adhering to the broadest possible definition of torture and inhumane treatment commonly accepted by the world community.¹⁶⁸ And, consistent with treaty obligations, the United States should acknowledge that there is no exemption for the use of torture for any reason, nor any ability of the President to transcend the law. Until the President explicitly and without equivocation renounces the assertions in the Bybee Memo, his attempts to renounce the events in Abu Ghraib will ring hollow.

¹⁶⁸ Such a position seemed to be proposed by Senators John McCain (who was tortured as a POW in North Vietnam) and Joseph Lieberman when they proposed the following definition of torture: "[N]o prisoner shall be subject to torture or cruel, inhumane or degrading treatment or punishment that is prohibited by the Constitution, law or treaties of the United States." Efron, *supra* note 160.

III. CONCLUSION

Abu Ghraib was not caused by a handful of sadistic, overworked, untrained soldiers. It was the inevitable result of an Administration that, in pursuit of the admirable goal of national security, lost sight of the need to maintain the soul of the nation. Even when our nation's physical security is at stake, its moral security matters.¹⁶⁹ As Professor Zamir writes:

national security . . . is not an end in itself . . . If in the course of the struggle for survival we sacrifice the principles of liberty, justice and peace on the altar of national security, no victory can be more than delusory. There is a form of survival which is not worth the effort.¹⁷⁰

Abu Ghraib was a national disgrace. It demonstrated that torture will be engaged in when the leaders in Washington send conflicting messages, ignore signs of abuse, and fail to absolutely and without exception condemn torture. It taught us that torture is frequently ineffective, but always harmful. In response to the tragedy, the Bush Administration must do more than rhetorically condemn torture. It must demonstrate in words and deeds that it will no longer produce memos that support the use of torture, it will no longer sanction inhumane practices anywhere, nor will it turn a blind eye to evidence of abuse. Moreover, for such a commitment to be meaningful, it must come with some degree of willingness to expose its practices to the scrutiny of the world community. Only if we truly heed the lessons of Abu Ghraib and take steps to ensure that this nation never again engages in torture will any good emerge from the darkness.

¹⁶⁹ Strauss, *supra* note 1, at 257.

¹⁷⁰ Itzhak Zamir, *Human Rights and National Security*, 23 ISR. L. REV. 375, 379-80 (1989).